TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted] 80

E. P. WILLIAMS AND J. B. CARR, AS PARTNERS UNDER THE FIRM NAME OF E. P. WILLIAMS & COMPANY, PLAINTIFFS IN ERROR,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED DECEMBER 31, 1892.

(23,468)

(23,468)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 403.

R. P. WILLIAMS AND J. B. CARR, AS PARTNERS UNDER THE FIRM NAME OF R. P. WILLIAMS & COMPANY, PLAINTIFFS IN ERROR,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Benjamin H. Hill, Chief Judge; Richard B. Russell, Judge; Joseph R. Pottle, Judge, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said record of a cause lately depending before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between R. P. Williams and J. B. Carr, as partners under the firm name of R. P. Williams and Company, plaintiffs in error, against United States Fidelity and Guaranty Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
2 of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said R. P. Williams and J. B. Carr, as partners under the firm name of R. P. Williams and Company as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of November, in the year of our Lord one thousand nine hundred and Twelve.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by:
BENJAMIN H. HILL, JR.,
(Chief Judge of the Court of Appeals of the State of Georgia.)

Filed in office Nov. 13, 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

3 UNITED STATES OF AMERICA, *ss:*

To United States Fidelity and Guaranty Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Georgia wherein R. P. Williams and J. B. Carr, partners under the firm name of R. P. Williams and Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Benjamin H. Hill, Chief Judge of the Court of Appeals of State of Georgia, this thirteenth day of November, in the year of our Lord one thousand nine hundred and Twelve.

BENJAMIN H. HILL, JR.,
(*Chief Judge, Court of Appeals of the State of Georgia.*)

4 On this — day of November, in the year of our Lord one thousand nine hundred and Twelve, personally appeared —— —— before me, the subscriber, —— —— and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — day of ——, A. D. 190—.

—— ——.

STATE OF GEORGIA,
County of Fulton:

I, the undersigned attorney of record for the defendant in error, in the within designated case, do hereby acknowledge due service of the above citation, and do hereby enter an appearance for said defendant in error in the Supreme Court of the United States. This November 13, 1912.

ALEX. W. SMITH,
(*Of Counsel for Defendant in Error.*)

Filed in office Nov. 13, 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

5 In the Court of Appeals of the State of Georgia.

No. 4270.

R. P. WILLIAMS and J. B. CARR, as Partners under the Firm Name of R. P. Williams and Company, Plaintiffs in Error,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant in Error.

Now comes R. P. Williams and J. B. Carr, doing business under the co-partnership name of R. P. Williams and Company, plaintiffs in error, and say:

That on the ninth day of October, 1912, judgment in this case was entered by this court against R. P. Williams and J. B. Carr, the plaintiffs in error, and that said judgment is final, this being the highest court in this State in which a decision can be had in the above stated case; that the said R. P. Williams and J. B. Carr were and are aggrieved in that, in said judgment and in the proceedings had prior thereto in this case, certain errors were committed to their prejudice; that this is an action brought by United States Fidelity and Guaranty Company, a corporation, against R. P. Williams and J. B. Carr, partners under the name of R. P. Williams and Company, to which action the said R. P. Williams and the said J. B. Carr plead their previous discharge in bankruptcy as a bar,

6 thus drawing in question the construction of the Act of Congress, establishing a uniform system of bankruptcy laws, and the amendments thereto; that the judgment of the trial court was that the construction and meaning of said Act of Congress, and the amendments thereto, were such that the discharge in bankruptcy set up by said R. P. Williams and the said J. B. Carr did not release them and was not a bar to the action of the plaintiff, thus denying to the said R. P. Williams and the said J. B. Carr the right claimed under said Act of Congress, and the amendments thereto; that said judgment was affirmed by the judgment of this court, and thus became final; that the decision of this court is against the right claimed by said R. P. Williams and the said J. B. Carr, plaintiffs in error, and, as they believe, contrary to the statutes of the United States, establishing a uniform system of bankruptcy laws, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, the said R. P. Williams and J. B. Carr, pray that a writ of error may issue to the Court of Appeals of the State of Georgia for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the United States Supreme Court.

ALEXANDER C. KING AND
J. HOWELL GREEN,
(Of Counsel for R. P. Williams and J. B. Carr).

7 KING, SPALDING & UNDERWOOD, AND
GREEN, TILSON & McKINNEY,
Att'ys for Plaintiffs in Error, Atlanta, Ga.

Filed in office Nov. 13, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

8 In the Court of Appeals of the State of Georgia.

No. 4270.

R. P. WILLIAMS and J. B. CARR, as Partners under the Firm Name of R. P. WILLIAMS AND COMPANY, Plaintiffs in Error,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant in Error.

Come now R. P. Williams and J. B. Carr, plaintiffs in error, in the above stated case, on this 13th day of November, 1912, and file and present to this court their petition, praying for the issurance of a writ of error intended to be urged before the United States Supreme Court by them; and praying further that a duly authenticated transcript of the record, proceedings, and papers, upon which the judgment herein was rendered may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is ordered by this court that a writ of error be allowed as prayed, provided however, that R. P. Williams and J. B. Carr, plaintiffs in error, give bond according to law in the sum of $500.00, which said bond shall
9 operate as a supersedeas bond.

In Testimony Whereof, witness my hand affixed this day and year aforesaid.

BENJAMIN H. HILL, JR.,
(*Chief Judge Court of Appeals of State of Georgia.*)

Filed in office Nov. 13, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

10 Know all men by these presents, That we, J. B. Carr and R. P. Williams, as principals, and the Title Guaranty and Surety Company, of Scranton, Pennsylvania, a corporation, as sureties, are held and firmly bound unto United States Fidelity and Guaranty Company, a corporation, in the full and just sum of five hundred and no/100 ($500.00) dollars, to be paid to the said United States Fidelity and Guaranty Company, or its certain attorney, executors, successors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirteenth day of

November, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the Court of Appeals of the State of Georgia in a suit depending in said court, between R. P. Williams and J. B. Carr, partners under the firm name of R. P. Williams and Company, plaintiffs in error, and United States Fidelity and Guaranty Company, a corporation, defendant in error, a judgment was rendered against the said R. P. Williams and J. B. Carr, partners under the firm name of R. P. Williams and Company, and the said R. P. Williams and J. B. Carr, partners as aforesaid, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and
11 a citation directed to the said United States Fidelity and Guaranty Company, a corporation, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said R. P. Williams and J. B. Carr, partners under the firm name of R. P. Williams and Company, shall prosecute to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TITLE GUARANTY & SURETY CO., [SEAL.]
By D. I. MACINTYRE,
Att'y-in-Fact. [SEAL.]
R. P. WILLIAMS. [SEAL.]
J. B. CARR. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by:

BENJAMIN H. HILL, JR.,
Chief Judge Court of Appeals of the State of Georgia.

Filed in office Nov. 13, 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

12 Supreme Court of the United States of America.

R. P. WILLIAMS and J. B. CARR, as Partners under the Firm Name of R. P. WILLIAMS AND COMPANY, Plaintiffs in Error,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendants in Error.

Come now the plaintiffs in error, in the above entitled case, towit, R. P. Williams and J. B. Carr, at the time of filing their petition

for a writ of error in said case, and aver and show that in the record and proceedings, and in the judgment rendered in said case, the said Court of Appeals of the State of Georgia erred, to the grievous injury and wrong of the plaintiffs in error herein, and to the prejudice and against the rights of the plaintiffs in error, in the following particulars, towit:

1. Because the said Court of Appeals of the State of Georgia erred in ruling that, under the Act of Congress establishing a uniform system of bankruptcy, and the amendments thereto, the said debt or claim sued on by the plaintiff in the court below in this case was such a contingent liability of said defendants in said suit that the same was not provable in bankruptcy, and was not discharged by the discharge in bankruptcy of said defendants;

2. Because the said Court of Appeals of the State of Georgia erred in ruling that the discharge in bankruptcy of the defendants
13 in the trial court, plaintiffs in error here, was not a sufficient defense against the claim or demand sued on in this case, under the provisions of the Act of Congress establishing a uniform system of bankruptcy, and the amendments thereto;

3. Because the facts in said case, as agreed upon, show that the said claim or demand sued on was barred by the discharge in bankruptcy of plaintiffs in error, and the said Court of Appeals of the State of Georgia erred in not so ruling, and in its construction of the said Act of Congress and the amendments thereto;

4. Because the said Court of Appeals of the State of Georgia erred in its construction of the said Act of Congress, establishing a uniform system of bankruptcy, and the amendments thereto, in their application to the facts in this case, and to the contract sued on in this case, in that said Court of Appeals construed said contract, under said statutes and under said agreed facts, as not being such a contract or liability as was, under said agreed facts, barred by the discharge in bankruptcy of the plaintiffs in error pleaded in said case;

5. Because, under the agreed facts in this case, the contract or liability sued on was discharged and barred, under the Act of Congress, establishing a uniform system of bankruptcy, and the amendments thereto, by the discharge of the plaintiffs in error, and
14 said judgment, holding the said plaintiffs in error liable thereto; despite their plea of discharge in bankruptcy, was error; and

6. Because the said Court of Appeals of the State of Georgia erred in not reversing the judgment of the trial court, and in not giving to the plaintiffs in error their rights under the statutes and laws of the United States, as set up in their plea of discharge in bankruptcy filed in the trial court.

Wherefore, for these and other manifest errors appearing in the record, the said R. P. Williams and the said J. B. Carr, plaintiffs in error, pray that the judgment of said Court of Appeals of the State of Georgia be reversed, set aside, and held for naught, and that judgment be rendered for plaintiffs in error, granting them their

rights under the statutes and laws of the United States; and the said plaintiffs in error also pray judgment for their costs.

ALEXANDER C. KING AND
J. HOWELL GREEN,
Of Counsel for Plaintiffs in Error.

KING, SPALDING & UNDERWOOD, AND
GREEN, TILSON & McKINNEY,
Att'ys for Plaintiffs in Error, Atlanta, Ga.

Filed in office Nov. 13, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

15 In the Court of Appeals of the State of Georgia.

R. P. WILLIAMS and J. B. CARR, Partners under the Firm Name of R. P. WILLIAMS AND COMPANY, Plaintiffs in Error,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendants in Error.

Præcipe.

To the Clerk of the Court of Appeals of the State of Georgia:

The above named plaintiffs in error do hereby request and require that you incorporate in the record in this case to the Supreme Court of the United States the following, towit:

1. The bill of exceptions;
2. The transcript of the record in the Court of Appeals of the State of Georgia from the City Court of Atlanta, except the demurrer, the order thereon, and the exceptions pendente lite;
3. The judgment and opinion of the Court of Appeals of the State of Georgia;
4. The original writ of error and the citation based thereon;
5. Copies of the petition for the writ of error, the order allowing the writ of error, the bond, the assignment of errors, and of this præcipe.

16 This 13th day of November, 1912.

ALEXANDER C. KING AND
J. HOWELL GREEN,
(*Of Counsel for Plaintiffs in Error*).

Service of the above præcipe is hereby acknowledged, a copy received, and all other and further notice is waived. We hereby agree that the record specified in the foregoing præcipe is all that is necessary to a clear understanding of the errors complained of. This 13 day of November, 1912.

ALEX. W. SMITH,
VICTOR L. SMITH,
(*Of Counsel for Defendant in Error*).

Filed in office Nov. 14, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

17 GEORGIA,
Fulton County:

Be it Remembered: That on the 15th day of August, 1911, United States Fidelity & Guaranty Company filed its suit in the City Court of Atlanta against R. P. Williams & Company and R. P. Williams and J. B. Carr, the individuals composing said company, which suit is designated upon the docket of said court by No. 22,934. At the appearance term of said court, and before the call of the appearance docket, the defendants filed their demurrer to plaintiff's petition. On the 30th day of March, 1912, after argument upon said demurrer, the court passed an order overruling said demurrer, which order was excepted to, and exceptions pendente lite certified, filed and recorded.

On the 2nd day of April, 1912, the defendants filed their plea and answer to said petition, and thereafter two amendments to said plea and answer were filed, one being filed on the 6th day of April, 1912, and the other on the 20th day of April, 1912.

Counsel for plaintiff and counsel for defendants entered into a written agreement, by which it was agreed that the court might try said case without the intervention of a jury, and pass upon both the law and the facts, and make a judgment therein, each party reserving the right to except to any finding or judgment that the court might make. The facts in said case were agreed upon in the
18 same instrument, which agreement was filed on the 20th day of April, 1912, and was by order of the court made a part of the record, and the case then taken up for a hearing by the court without a jury upon said agreement. After argument by counsel for plaintiff and for defendants, the court passed an order upon said agreement and agreed statement of facts, finding in favor of the plaintiff.

Defendants except to the ruling of the court overruling their demurrer to plaintiff's petition, and say that said demurrer should have been sustained by the court, and plaintiff's petition dismissed. Defendants assign error upon said ruling, and upon the exceptions pendente lite heretofore filed to the ruling of said court upon said demurrer.

Defendants except to the judgment of the court upon the agreement between counsel for plaintiff and counsel for defendants submitting said case to the court to be tried without the intervention of a jury and agreeing upon the facts in said case, and say that the court erred in applying the law to the facts agreed upon; that under the law, when properly applied to the facts agreed upon by counsel for plaintiff and defendants, the court should have found in favor of the defendants; that under the facts agreed upon by counsel for plaintiff and defendants, the judgment of the court should have been in favor of the defendants. Defendants assign error
19 upon the judgment of the court upon said agreement, and say that the judgment should have been in favor of the defendants, instead of in favor of the plaintiff.

Defendants specify as material to a clear understanding of the errors complained of the following portions of the record, towit:

(*a*) Plaintiff's petition.

(*b*) Defendants' demurrer to said petition and the order thereon overruling said demurrer.

(*c*) The exceptions pendente lite filed to the ruling of the court on said demurrer.

(*d*) Defendants' plea and answer, and the two amendments thereto, the first amendment filed on the 6th day of April, 1912, the second filed on the 20th day of April, 1912, and the orders allowing said amendments.

(*e*) The agreement entered into by counsel for plaintiff and counsel for defendants submitting said case to the court without the intervention of a jury and agreeing upon the facts.

(*f*) The judgment of the court, passed on the 20th day of April, 1912, upon said agreement, finding in favor of the plaintiff.

And now, within the time allowed by law, come the defendants, and tender this, their bill of exceptions to the rulings complained of, and pray that the same may be certified, filed and transmitted to the Court of Appeals, in order that the errors complained of may be considered and corrected.

GREEN, TILSON & McKINNEY,
Attorneys for Defendants.

J. H. G.—H. M. P.

I do certify that the foregoing bill of exceptions is true, and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the City Court of Atlanta is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Court of Appeals, that the errors alleged to have been committed may be considered and corrected.

This 18 day of May, 1912.

H. M. REID,
Judge City Court of Atlanta.

Filed in office 31st day of May, 1912.
ARNOLD BROYLES, *Clerk.*

21 Due and legal service of the within bill of exceptions and writ of error is hereby acknowledged. Copy received, and all other and further notice waived.

This May 20, 1912.

SMITH, HAMMOND & SMITH,
Att'ys for U. S. F. & G. Co., Deft. in Error.

GEORGIA,
Fulton County:

I hereby certify, that the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, to wit: R. P. Williams & Company et al., plaintiff in error, vs.

United States Fidelity and Guaranty Co., defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this the 10 day of June, 1912.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk, City Court of Atlanta.

22 (Endorsed:) Case No. 4270. March Term, 1912. Court of Appeals of Georgia. R. P. Williams & Co. et al., Pl'ffs in Error, vs. United States Fidelity & Guaranty Co., Def't in Error. Bill of Exceptions. Filed in office June 15, 1912. Logan Bleckley, Clerk, C. A. Ga.

23 (*Original Petition.*)

City Court of Atlanta, Sept. Term, 1911.

No. 22934.

UNITED STATES FIDELITY & GUARANTY CO.
vs.
R. P. WILLIAMS & CO. et al.

GEORGIA,
Fulton County:

To the City Court of Atlanta, said County:

The petition of the United States Fidelity & Guaranty Company, a corporation, respectfully shows:

1. That on or about March 29, 1900, the firm of R. P. Williams & Company, of Decatur, De Kalb County, Georgia, was composed of J. B. Carr and R. P. Williams, both of whom are residents of Fulton County, Georgia.

2. That the said R. P. Williams & Company, the said J. B. Carr and the said R. P. Williams are made defendants hereto.

3. That on or about said date your petitioner executed, through their then agents, McCandless & Patterson, Atlanta, Ga., a bond in the penalty of seven thousand five hundred ($7,500.00) dollars, on behalf of the said firm of R. P. Williams & Co., in favor of W. W. Hampton, G. W. Hyde and J. H. Vidal, trustee of subschool district No. 26, of Alachua County, Florida, to guarantee the faithful performance and completion of a contract for the construction of a *of a* district school building at Gainesville, Florida. A
24 copy of said bond is hereto attached marked Exhibit "A."

4. Contemporaneously with the execution and delivery of said bond and as a condition thereto, the said defendants executed under seal and delivered to the plaintiffs a written application for said bond, under the terms and conditions of which, among other things, the said defendants obligated themselves as follows:

"In consideration of the United States Fidelity & Guaranty Co., becoming security on our bond herein applied for, we do hereby

covenant and agree to pay the premium or fees hereafter agreed upon, namely, thirty-seven and 50/100 dollars, and we do hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns, to indemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever resulting from any act, default or neglect of ours, that said United States Fidelity & Guaranty Co., may sustain or incur by reason of its having executed said bond or any continuation thereof. And we do further agree, in the event of our being unable to complete or carry on the aforementioned contract, to assign such plant as we may own, or have upon said work, to the said United States Fidelity & Guaranty Company, that it may use the same in the prosecution of said work to completion. We hereby further agree for ourselves, our heirs, executors and administrators to accept the vouchers or other evidence of any losses paid by the United States Fidelity & Guaranty Company, under the aforesaid obligation, together with vouchers, or other evidence of payment, of all costs and expenses whatever incurred by the said United States Fidelity & Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against us, and our individual estates of the fact and extent of our liability, under said obligation to the said United States Fidelity & Guaranty Company.

25

And we do further agree in the event of any breach of default on our part of the provisions of the contract hereinbefore mentioned that the United States Fidelity & Guaranty Company as surety on the aforesaid bond shall be subrogated to all our rights and properties as principals in said contract and that deferred payment and any and all moneys and properties that may be due and payable to us, at the time of such breach or default or that may thereafter become due and payable to us on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity & Guaranty Company under the bond above mentioned.

In testimony whereof we have hereunto set our hands and seals, this the 24th day of March, 1900."

5. This obligation was executed by the defendants acting by and through J. B. Carr, a member of said firm, and is dated March 24, 1900.

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6. A copy of said application and indemnity agreement is hereunto attached and made a part of this amendment, marked Exhibit "B."

7. Your petitioner further shows that on the 1st day of July, 1904, judgment was rendered by the Circuit Court of the United States for the Southern District of Florida in favor of the above mentioned trustees of the said school district for the use and benefit of the board of public instruction of the County of Alachua against your petitioner as surety on the above set forth bond.

8. Your petitioner shows that in full satisfaction of said judgment, it did on or about the 20th day of Feb., 1905, pay to said trustees of said school district the sum of fifty four hundred and seventy five and thirty six one hundredths ($5,475.36) dollars. A copy of

the receipt and satisfaction for which is hereto attached and marked Exhibit "C."

9. Your petitioner shows that it incurred the following items of expense in the defense of said suit against it on the above set forth bond, to wit:

Jan. 7, 1901, To expense	$43.81
Oct. 26, 1901, Paid F. and D. Co., on removal bond	5.00
Nov. 1, 1901, Expense E. E. Bogle	73.70
Jan. 1, 1902, Fleming and Fleming, Att'ys	100.00
July 9, 1902, expense	20.00
Aug. 6, 1903 "	12.72

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Aug. 31, 1903, expense	8.16
Sept. 18, 1903, "	5.00
April 4, 1904, "	118.80
Aug. 29th, 1904, F. & D. premium on appeal bond	15.00
Sept. 14, 1904, Fleming and Fleming, Att'ys	518.68
Feb. 14, 1905, W. H. Hampton, et al., loss	5,475.36
March 6, ——, Fleming and Fleming	278.00
	$6,674.23

10. Petitioner shows that it, as surety for the said R. P. Williams & Co., has never been repaid said sums by the said R. P. Williams & Co., nor any part thereof by said firm or any member thereof.

And your petitioner further shows that each and all of them refused to do so.

11. By reason of the facts aforesaid plaintiff alleges that the said defendants are liable jointly and severally to the plaintiff to indemnify and pay over to the plaintiff the loss, costs, damages, charges and expenses above set forth, all of which plaintiff alleges resulted from the default of the said defendants under said contract, for the faithful performance of which the said bond was given, and said indemnifying contract made.

Wherefore plaintiff prays process against said defendants requiring them to be and appear at the next term of said Court to answer this complaint.

SMITH, HAMMOND & SMITH,
Petitioner's Att'ys.

28 (EXHIBIT A.)

The United States Fidelity & Guaranty Co.

Home Office: Baltimore, Maryland.

Know all men by these presents, that we, R. P. Williams & Co., of Decatur, Georgia, (hereinafter called the principals), and the United States Fidelity & Guaranty Company, a corporation created and existing under the laws of Maryland, and whose principal office

is located in Baltimore City, Maryland (hereinafter called the Surety), are held and firmly bound unto Wm. W. Hampton, G. W. Hyde and J. H. Vidal, Trustees of Sub-school District No. 26 of Alachua County, Florida, in the full and just sum of seventy-five hundred ($7,500.00) dollars, good and lawful money of the United States of America, to the payment of which said sum of money, well and truly to be made and done, the said principals bind themselves, their heirs, executors, and administrators, and the said surety binds itself, its successors and assigns, jointly and severally, firmly by the these presents, signed sealed and dated this 29th day of March, A. D. 1900.

Whereas, said principals have entered into a certain written contract being dated the third day of April, A. D. 1900, by and between them and the Board of Public Instruction for the County of Alachua, in the State of Florida, represented by the Trustee of Sub-school District No. 26, of said county, to perform all the work and provide all the material mentioned in the specifications and shown
29 on the drawings prepared by Wilson and Edwards, for the graded school building to be erected at Gainesville, Florida; said contract being made a part hereof as fully to all intents and purposes as if set forth at length herein:

Now, therefore, the condition of the foregoing obligation is such that if the said principals shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on their part to be kept and performed according to its tenor, then this obligation to be null and void; otherwise to be and remain in full force and virtue in law.

This bond is issued subject to the following provisions:

Provided, that said surety shall be notified in writing of any act on the part of said principals or their agents or employees which may involve a loss for which the said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the fully authorized representative or representatives of Wm. W. Hampton, G. W. Hyde and J. H. Vidal, Trustees of sub-school district No. 26 of Alachua County, Florida, who shall have the supervision of the completion of said contract, and a registered letter mailed to the President of said surety, at its principal office in Baltimore City, Md., shall be deemed sufficient notice within the meaning of this bond.

30 Provided further, that if the said principals shall fail to comply with all the conditions of said contract to such an extent that the same shall be forfeited, then said surety shall have the right and privilege to assume said contract and to sublet or complete same, which ever said surety may elect to do, provided it is done in accordance with said contract.

Provided further, that in the event of any breach of the conditions of this bond, said surety shall be subrogated to all the rights and provisions of said principals arising out of said contract, and all deferred payments and any and all moneys and properties at that time due and payable, or that may thereafter become due and payable, or that may thereafter become due and payable to the said principals,

under and by virtue of said contract, shall be credited upon any claim the said Wm. W. Hampton, G. W. Hyde and J. H. Vidal, Trustees of sub-school District No. 26 of Alachua County, Florida, may make upon said surety because of said breach.

Provided, further, that any suitable law or proceedings in equity brought against this bond to recover any claim hereunder, must be instituted within six months after the first breach of said contract.

And provided, further, that said surety shall not be liable for a greater sum than seventy five hundred ($7,500.00) dollars, because of or on account of this bond.

31 And provided, lastly, that the assured or the superintendent of the work must give the said surety due notice before the last payment under the contract herein referred to is made to the principals, otherwise this obligation shall be void as to any liability of the surety hereunder.

In testimony whereof, the said principals have hereunto set their hands and seals, and the said surety has caused these presents to be sealed with its corporate seal, duly attested by the signatures of its president and its assistant secretary, the day and year first above written.

R. P. WILLIAMS & CO., [SEAL.]
Per J. B. CARR. [SEAL.]

THE UNITED STATES FIDELITY
& GUARANTY COMPANY.
JOHN R. BLAND, *President.*

Signed, sealed and delivered in the presence of:

HORATIO DAVIS.
JOHN E. LAMBETH.

Attest:

ARTHUR C. PIERCE, [SEAL.]
Assistant Secretary.

32 EXHIBIT B.

Form G. 101048.
Contractors.

The United States Fidelity & Guaranty Co.

Home Office, S. W. Corner Calvert & German Streets, Baltimore, Md.

Bond 83756.

Applicants must give full and explicit data under the following heads, and must supply copies of Specifications and contract for filing with this application. The information asked for is essential to the proper preparation of the bond and the company's judgment

of the case, hence care in answering will expedite the issuance of the bond.

Firm name of Applicants, R. P. Williams & Co.

Business Address, Decatur, Ga.

Individuals composing firm:

Names.	Age.	Address.
R. P. Williams	28	Decatur, Ga.
J. B. Carr	51	" "

Amount of bond required, $75,00-.00, seventy-five thousand dollars. To whom given. Give full name. If to a corporation, give exact corporate title and the names of officers required to sign corporate instruments, also the business address of individual, firm or corporation: W. W. Hampton, G. W. Hyde, and J. H. Vidal, trustees of sub-school district No. 26 of Alachua County, Florida.

Nature of the Contract: For the erection of a grade school
33 building in Gainesville, Fla. The main building is 32′—0″ x 126′—6″ and two stories high. (No basement.) Auditorium in rear, see plans, one story high, built of brick and wood, with tin roof and stone window sills, to first story and stone steps. Contract price, $14,919.00.

If contract price is per unit of measure, give also probable total of contract:

Total of contract, $14,919.00.

Other bidders on above contract:

(Highest) S. H. Dempsey, Gainesville, Fla	$17,500.00
(Lowest) R. P. Williams & Co., Decatur, Ga	14,919.00

Date work to be commenced: As soon as material can be delivered.

Date work is to be completed: On or before the first day of Sept. 1900.

Penalty for non-completion at above date, None.

Premium for Completion before above date, None.

Payments to be made semi-monthly on estimates of the architects as the work progresses.

Per centage reserved from payments until completed: Twenty per cent.

Other features of contracts. Mention experience in line of work
to be undertaken, also give data, regarding recent contracts
34 completed or under way. One member of the firm has been in the business over twenty years, the other eight years. Buildings recently finished is court house and jail at Anderson, S. C., school building at Montezuma, Ga., court house at Decatur, Ga. Buildings under way and nearly completed. First Presbyterian Church and residence for James A. Chapman at Spartanburg, S. C. Alumni Hall for Furman University at Greenville, S. C.

Statement of Firm's Assets and Liabilities.

Available cash	1,400.00
Stocks, Bonds, etc., market value	.....
Real estate, consisting of granite quarry at Redan, Ga.	5,000.00
Plant, consisting of stock of supplies	2,780.00
Notes receivable	.....
Accounts receivable	4,963.00
Other assets consisting of tools and tackle	1,700.00
Total Assets	15,843

Borrowed or due on stock, bonds, etc	.....
Borrowed or due on real estate	.....
Incumbrance on plant	.....
Notes payable	500.00
Accounts payable	4,194.00
Other liabilities	.....
Total liabilities	$4,964.00

Amount of liability as endorser or surety for others, None.

35 Amount of Employer's liability Insurance carried (give name of companies). $10,000.00 Travelers Insurance Co. of Hartford Ct. Mention individual property holdings, real and personal, of the members of the firm, not included in above statement; also state encumbrances upon same, if any.

Personal property about 2,500 or 3,000.

References.

Names.	Business.	P. O. Address.
J. D. Maxwell	Insurance Agt	Anderson, S. C.
T. E. Epting	Merchant	Newberry, S. C.
Wm. M. Ragsdale	Ordinary	Decatur, Ga.
Dr. H. C. Judson	Prof. Furman Univer'y	Greenville, S. C.

Indemnity.

In consideration of the United States Fidelity & Guaranty Co., becoming surety on our bond herein applied for we do hereby covenant and agree to pay the premium or fees hereafter agreed upon, namely, thirty-seven and 50/100 dollars, and we do hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns, to idemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever, resulting from any act, default, or neglect of ours that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof. And we do further agree, in the event

36 of our being unable to complete or carry on the aforementioned contract, to assign such plant as we may own, or have

upon said work, to the said United States Fidelity & Guaranty Company, that it may use same in the prosecution of said contract to completion. We hereby further agree for ourselves, or heirs, execution and administrators to accept the vouchers or other evidence of any loss paid by the said United States Fidelity & Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against us, and our individual estates of the fact and extent of our liability, under said obligation to the said United States Fidelity & Guaranty Company.

And we do further agree in the event of any breach or default on our part of the provisions of the contract hereinbefore mentioned, that the United States Fidelity & Guaranty Company as surety upon the aforesaid bond shall be subrogated to all our rights and properties as principals in said contract and that deferred payments and any and all moneys and properties that may be due and payable to us, at the time of such breach or default or that may thereafter become due and payable to us on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity & Guaranty Company under the bond above mentioned.

In testimony whereof, we have hereunto set our hands and
37 seals, this 24th, day of March, 1900.

R. P. WILLIAMS & CO., [SEAL.]
Per C.
R. P. WILLIAMS,
Member of Firm,
Per C.
J. B. CARR, *Member of Firm.*

Witness:
W. H. REYNOLD.

Statement of Agent.

Personal knowledge of applicants, reputed ability and experience good and we have hereto written several bonds for these people. We think they are quite reliable for all contracts made and conservative business men.

Premium agreed upon or best offer made.

Indemnity offered, nature and extent of same.

March 24, 1900.

McCANDLESS & PATTERSON, *Agent.*

Impress upon the applicant the necessity of full and explicit answers to the various questions. At time of forwarding to home office make note of features not covered by replies and supply the information asked for at as early a date as possible. See that the application is properly signed and the signatures witnessed. Secure copy of contract and specification for file with this application. Attention to these various features will insure prompt action.

38 EXHIBIT C.

Received from the United States Fidelity & Guaranty Company five thousand four hundred and seventy-five and 36/100 dollars in full payment and satisfaction of a judgment rendered by the Circuit Court of the United States for the Southern District of Florida, on the first day of July, 1904, in favor of the undersigned W. W. Hampton, G. W. Hyde, and J. H. Vidal, as trustees of sub-school district No. 26 of Alachua County, Florida, for the use and benefit of the Board of Public Instruction of the County of Alachua, against the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and we hereby authorize the clerk of said court to enter full satisfaction of the said judgment of record.

W. W. HAMPTON,
G. W. HYDE,
JAS. H. VIDAL,
As Trustees of Sub-school District No. 26 of Alachua County, Florida, for the Use and Benefit of the Board of Public Instruction of the County of Alachua.

STATE OF FLORIDA,
County of Alachua:

Before me, a notary public in and for the State of Florida, personally appeared W. W. Hampton, G. W. Hyde and J. H. Vidal, to me well known as the person- described in the foregoing satis-
39 faction piece and acknowledged that they executed the same for the purposes therein expressed.

Witness my hand and official seal this 20th day of February, A. D. 1905.

J. W. CANNON,
Notary Public, State of Florida.

My commission expires Oct. 15, 1906.

I, Eugene O. Locks, Clerk of the United States Circuit Court in and for the Southern District of Florida, do hereby certify that the foregoing satisfaction of judgment was endorsed on the judgment Record at page 228, on Feb. 23rd, 1905. The same being the record in which the original judgment is entered, viz., Series "A."

In witness whereof I hereunto set my hand officially and affix the seal of said court this Feb. 23rd, 1905.

E. O. LOCKE, *Clerk,*
By C. E. JOHNSON,
Deputy Clerk.

Filed in office this the 15th Aug., 1911.
T. C. MILLER, *D. Clerk.*

40 STATE OF GEORGIA,
County of Fulton:

UNITED STATES FIDELITY & GUARANTY CO.
vs.
R. P. WILLIAMS & COMPANY and J. B. CARR and R. P. WILLIAMS.

To the Sheriff or his Deputy of said County, Greeting:

The defendants are hereby required, personally or by attorney to be and appear at the City Court of Atlanta, to be held in and for said county, on the first Monday in September 1911, then and there to answer the plaintiff's complaint as in default thereof said court will proceed as to justice shall appertain.

Witness the Honorable H. M. Reid, Judge of said Court, this 15 day of Aug. 1911.

T. C. MILLER, *D. Cl'k.*

GEORGIA,
Fulton County:

I have this day served the defendant R. P. Williams & Co., a firm composed of J. B. Carr and R. P. Williams by serving the said R. P. Williams by leaving a copy of the within writ and process at his place of residence in this county.

This Aug. 19th, 1911.

G. H. BRODNAX, *D. Sh'ff.*

41 GEORGIA,
Fulton County:

I have this day served the defendant, J. B. Carr, by leaving a copy of the within writ and process at his most notorious place of abode in this county.

This Aug. 19th, 1911.

G. H. BRODNAX, *D. Sh'ff.*

GEORGIA,
Fulton County:

I have this day served the defendant, R. P. Williams, by leaving a copy of the within writ and process at his most notorious place of abode in this county.

This Aug. 19, 1911.

G. H. BRODNAX, *D. Sh'ff.*

42 (*Plea & Answer.*)

GEORGIA,
Fulton County:

Now comes the defendants in the above stated case, and for answer to plaintiff's petition say:

1. Defendants admit paragraphs one and two of plaintiff's petition.
2. In answer to paragraph three of plaintiff's petition, these de-

fendants admit that the bond referred to in said paragraph three was executed by the defendant-, with the plaintiff as surety thereon, but as defendants have not a copy of said bond in their possession, they are unable, for lack of sufficient information, to say whether or not the copy bond attached to said petition as "Exhibit A" is a correct copy.

3. In answer to that portion of plaintiff's petition which follows immediately after paragraph three of plaintiff's petition, but which is not numbered, but evidently was intended to be numbered four, as there is no paragraph numbered four in said petition, these defendants say that a few days prior to the execution of the bond referred to in paragraph three of said petition, they filed with the Agents of plaintiff in Atlanta, Georgia, an application for the bond referred to in paragraph three of said petition, and the extract from said application set out in that portion of the petition referred to may
42½ be a correct extract from the application made by these defendants for said bond, but as said application is in possession of the plaintiff, these defendants cannot state positively whether it is correctly set forth in said petition or not, and, for lack of sufficient information, neither admit nor deny the contents of said application.

4. These defendants admit paragraph five of plaintiff's petition.

5. In answer to paragraph six of plaintiff's petition, these defendants say that, for lack of sufficient information, they can neither admit nor deny that the copy attached to said petition, and marked "Exhibit B", is a correct copy of the application referred to in said paragraph six, as these defendants have not a copy or the original of said application in their possession, the same being in possession of the plaintiff.

6. These defendants admit the allegations contained in paragraph seven of plaintiff's petition.

7. For lack of sufficient information, these defendants can neither admit nor deny that the amount of the judgment set forth in paragraph eight of plaintiff's petition is correct, and, for the same reason, they can neither admit nor deny the copy receipt attached to said petition, and marked "Exhibit C".

8. For lack of sufficient information, these defendants can
42¾ neither admit nor deny the allegations contained in paragraph nine of plaintiff's petition.

9. These defendants admit paragraph ten of plaintiff's petition.

10. These defendants deny paragraph eleven of plaintiff's petition.

11. For further answer to said petition, these defendants say that on the 28th day of May, 1901, said R. P. Williams & Company filed their voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Georgia, praying that said firm and the individual members thereof, towit: R. P. Williams and J. B. Carr, be adjudged bankrupt, and on the same date said firm and each member composing the same were, by order of said court, so adjudged bankrupt.

12. That the claim sued upon by plaintiff in this suit was set forth

in the schedule filed by these defendants in the said bankruptcy court.

13. That the claim sued upon in plaintiff's petition is a claim from which defendants are discharged by a discharge in bankruptcy.

14. That the said R. P. Williams & Company and the said R. P. Williams and J. B. Carr, filed their petition in said bankruptcy court for a discharge on the 20th day of September, 1901, and on
43 the 5th day of October, 1901, the said R. P. Williams & Company, R. P. Williams and J. B. Carr, were granted a discharge in bankruptcy by an order of said court.

15. That the above mentioned discharge of the said R. P. Williams & Company, R. P. Williams and J. B. Carr is a complete bar to the claim sued upon by plaintiff in this case.

Having fully answered plaintiff's petition, defendants, pray that they and each of them may be discharged and acquitted of any and all liability to plaintiff, with their costs.

GREEN, TILSON AND McKINNEY,
Def'ts' Att'ys.

Filed in office this the 2nd day of April, 1912.

W. W. CLARKE, *D. Cl'k.*

(Amended Plea.)

GEORGIA,
Fulton County:

Now comes the defendants in the above stated case, and amend their plea heretofore filed as follows:

1. They allege that they were unable to complete the construction of the school building referred to in paragraph three of plaintiff's petition, in accordance with the terms of the contract referred to in said paragraph three, and on or about the 9th day of No-
44 vember, 1900, notified the trustees referred to in said paragraph three of plaintiff's petition, and also the architects for said building, towit: Wilson & Edwards, of their inability to complete said building, and abandoned said contract.

2. That the said trustees for sub-school district No. 26 Alachua County, Florida, then took charge of said building, and completed the same on or about the 13th day of April 1901.

3. That on or about the 9th day of May, 1901, the amount expended by said trustees on the completion of said building in excess of the contract price was audited by said architects, and ascertained, and on or about the 14th day of May, 1901, said trustees as aforesaid, gave notice to United States Fidelity & Guaranty Company of the completion of said building, and demanded of said company the payment of the amount expended by said trustees for the completion of said building in excess of the contract price therefor.

GREEN, TILSON & McKINNEY,
Dif'ts' Att'ys.

This amendment allowed subject to demurrer. This April 6, 1912.

H. M. REID, *Judge.*

Filed in office this the 6th day of April, 1912.
T. C. MILLER, *D. Cl'k.*

45 (*Amendment to Answer.*)

GEORGIA,
Fulton County:

Now comes the defendants in the above stated case, and, by leave of the court, amend their plea and answer heretofore filed as follows, to-wit:

1. They allege that the trustees of sub-school district No. 26 Alachua County, Florida, proved their claim in bankruptcy in the United States District Court for the Northern District of Georgia, which arose by breach of the bond referred to in the pleadings in this case, against the defendants herein on the 31st day of July, 1901.

GREEN, TILSON & McKINNEY,
Att'ys for Def'ts.

The foregoing amendment is allowed, subject to demurrer.
This 20th day of April, 1912.

H. M. REID, *Judge.*

Filed in office this the 20th day of April, 1912.
T. C. MILLER, *Clerk.*

46 (*Agreement for Court to Try.*)

GEORGIA,
Fulton County:

It is agreed between counsel for plaintiff and counsel for defendants in the above stated case that the judge may try the above stated case, without the intervention of a jury, and pass upon both the law and the facts, and make a judgment therein, each party reserving the right to except to any finding or judgment that the court may make.

It is further agreed that the facts in said case are as follows, to-wit:

It is admitted that the facts alleged in paragraphs one, two, three, four, five, six, seven, eight and ten of plaintiff's petition are true.

In addition to the amount admitted to have been paid by the plaintiff, as stated in paragraph eight of plaintiff's petition, it is further admitted that the sum of $896.00 was paid by plaintiff to Fleming and Fleming, as attorneys, for services in defending and settling the claim of the school trustees on the bond referred to in paragraph three of plaintiff's petition against the United States Fidelity & Guaranty Company.

The other items of paragraph nine are eliminated and withdrawn from the case, except the item of the judgment, towit:
47 $5,475.36 which has already been admitted in paragraph eight of plaintiff's petition.

It is further agreed that R. P. Williams & Company, the defendants in the present suit, abandoned the contract that they had with the trustees of sub-school district No. 26, Alachua County, Florida, for the erection of the school house referred to in the bond set out in plaintiff's petition, on the 9th day of Nov. 1900, and that immediately thereafter said trustees took charge of said building and completed the same on the 13th day of April, 1901; that on the 14th day of May, 1901, the trustees of said school district notified the plaintiff in this case, and surety on the bond referred to, of the completion of said school building, and made demand upon said bond company for the payment of the amount that they had expended upon said building in excess of the contract price thereof; that on the 28th day of May, 1901, R. P. Williams & Company filed a voluntary petition in bankruptcy in the United States District Court for the Northern District of Georgia, praying that said firm and the individual members thereof, towit: R. P. Williams and J. B. Carr, be adjudged bankrupt, and on the same date the court passed an order adjudging said partnership and each member thereof bankrupt; that under Schedule A2, "Creditors holding securities," the petitioners in bankruptcy filed the following: "In
48 April, 1900, R. P. Williams & Company entered into a contract with the trustees of sub-school district Alachua County, Florida, to build a district school building. To guarantee the completion of this contract, the said R. P. Williams & Company gave a bond in the sum of $——, with the United States Fidelity & Guaranty Company as surety. On November 9, 1900, said school board terminated said contract by taking said building out of the hands of said R. P. Williams & Company. Whether or not there will be any liability on said bond petitioner is unable to say, as the matters involved in said contract and said building and the termination thereof have not been adjusted. Said school trustees are represented by a chairman, whose name is W. W. Hampton, Gainesville, Florida, said company is represented by W. H. Patterson, Atlanta, Georgia." Under Schedule A3, "Creditors whose claims are unsecured," the petitioners in bankruptcy filed the following: "United States Fidelity & Guaranty Company, of Atlanta, Georgia, W. H. Patterson, Agent, liability contracted in Atlanta in 1900. This liability is fully described under schedule A2." W. W. Hampton, G. W. Hyde and J. H. Vidal, as trustees of sub-school district No. 26 Alachua County, Florida, proved their claim in the Bankrupt Court for $6,876.08, for money expended in building said school building in excess of the contract price, on July 31, 1901. No dividend was paid to the creditors, the assets, amounting to about $301.00 being consumed in the administration of the estate.

49 On the 20th day of September, 1901, R. P. Williams & Company, J. B. Carr and R. P. Williams filed their petition in said court for discharge, and on the 5th day of October, 1901, an

order was passed by the court granting a discharge in bankruptcy to R. P. Williams & Company, J. B. Carr, and R. P. Williams.

SMITH, HAMMOND AND SMITH,
Counsel for Plff.
GREEN, TILSON & McKINNEY,
Counsel for Defts.

The within and foregoing agreement and statement of facts and stipulation to try the case before the Judge of said court without a jury is approved and ordered filed as a part of the record in said case.

This April 20th, 1912.

H. M. REID, *Judge.*

Filed in office this the 20th day of April, 1912.
T. C. MILLER, *D. Cl'k.*

50 *(Judgment.)*

The within case came on for trial before the Judge of the City Court of Atlanta on an agreed statement of facts and submission to the court without a jury as appears of record and after hearing the same and being fully advised it is considered, ordered and adjudged by the court that the plaintiff recover of said firm the defendants R. P. Williams and Company a partnership composed of R. P. Williams and J. B. Carr and from said Williams and said Carr as members of said firm the principal sum of six thousand three hundred and seventy one dollars, thirty one hundred and seventy-six dollars interest to date and —— dollars costs and execution may issue therefor in regular course.

In open court, April 20th, 1912.

H. M. REID, *Judge.*

51 STATE OF GEORGIA,
County of Fulton:

I hereby certify, that the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required, by the order of the Presiding Judge, to be sent to the Court of Appeals of Ga., in the case of R. P. Williams & Co. et al., plaintiff in error, vs. United States Fidelity & Guaranty Co., defendant in error.

I further certify that on account of the volume of work in my office I was unable to make up and transcribe the within record to the Court of Appeals in the time prescribed by law.

Witness my signature and the seal of court affixed this the 10 day of June, 1912.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

52 (Endorsed:) No. 4270. March Term, 1912. Court of Appeals of Ga. R. P. Williams & Co. et al., Pl'ff in Error, v. United States Fidelity & Guaranty Co., Def't in Error. Transcript of Record. Filed in office June 15, 1912. Logan Bleckley, Clerk, C. A. Ga.

53 13. Case No. 4270.

Court of Appeals of Georgia.

WILLIAMS & COMPANY
v.
UNITED STATES FIDELITY & GUARANTY CO.

By the COURT:

1. Where, in consideration of the execution of a bond by a surety company, the condition of which was the faithful performance by the principal of a certain building contract, the principal executed a written instrument as a part of the application for the bond, agreeing to indemnify the surety company "against all loss, costs, damages, charges, and expenses whatever resulting from any act, default, or neglect" of the principal which the surety might "sustain or incur," the indemnity agreement of the principal was not merged in and extinguished by the bond, but suit for its breach could be brought thereon at any time within the statutory period.

2. The liability of the principal to the surety in the bond, under the indemnity agreement set forth above, does not constitute a claim provable in bankruptcy against the estate of the principal until the surety has actually paid the obligee in the bond the damages sustained by reason of the principal's default. No such damage has been sustained or incurred by the surety, within the
54 meaning of the agreement, until after actual payment.

* * * * * * *

The case as made by the petition was substantially as follows: The defendant entered into a contract for the building of a school house in the State of Florida. They executed to the trustees of the school a bond in the penal sum of $7,500, conditioned to comply faithfully with all of the terms of the contract. The bond further provided that if the principals should fail to comply with the conditions of the contract to such an extent that the same should be forfeited, the surety should have the right to assume the contract and to sublet or complete the building, whichever the surety might elect to do; that in the event of a breach of any of the conditions of the bond the surety should be subrogated to all the rights of the principals under the contract, and all deferred payments and all money and property at that time due and payable, or which might thereafter become due and payable to the principals under the contract, should be credited upon any claim which the trustees might make upon the surety because of the breach of contract. The bond was issued pursuant to a written application made to the surety

company by the contractors, in which they agreed to indemnify the surety "against all loss, costs, damages, charges, and ex-
55 penses whatever resulting from any act, default, or neglect of ours that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof." The agreement further provided: "And we do further agree, in the event of our being unable to complete or carry on the aforementioned contract, to assign such plant as we may own, or have upon said work, to the said United States Fidelity and Guaranty Company, that it may use the same in the prosecution of said work to completion. We hereby further agree, for ourselves, our heirs, executors, and administrators, to accept the vouchers or other evidence of any losses paid by the United States Fidelity & Guaranty Company, under the aforesaid obligation, together with vouchers, or other evidence of payment, of all costs and expenses whatever incurred by the said United States Fidelity & Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against us and our individual estates of the fact and extent of our liability, under said obligation to the said United States Fidelity & Guaranty Company. And we do further agree, in the event of any breach or default on our part of the provisions of the contract hereinbefore mentioned, that the United States Fidelity & Guaranty Company, as surety on the aforesaid bond, shall be subrogated to all our rights and properties as principals in said contract, and that deferred payment
56 and any and all moneys and properties that may be due and payable to us at the time of such breach or default, or that may thereafter become due and payable to us, on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity & Guaranty Company under the bond above mentioned." The application, with the agreement made by the contractors embodied therein, was under seal and duly signed by the contractors.

The application was made on March 24, 1900, and the bond was on March 29, 1900. The contractors having defaulted, suit on the bond was brought against the principals and the surety, and on July 1, 1904, judgment was duly rendered against them, and on February 20, 1905, the surety paid the judgment, amounting to $5,475.36. The present suit was brought by the surety against the principals in the bond, to recover this sum, together with certain sums paid by the surety for attorney's fees, costs, and other expenses, in connection with the litigation. After setting forth the facts above detailed, the plaintiff alleges that by reason of these facts, the defendants are liable, jointly and severally, to indemnify and pay over to the plaintiff the loss, costs, damages, and charges above set forth, all of which, it is averred, resulted from the default of the defendants under the contract, for the faithful performance of which the bond was given and the indemnity contract made.
57 The defendants demurred to the petition, upon the ground that it did not distinctly appear upon what cause of action the plaintiff had declared,—whether for money paid for the use of

defendants or upon the judgment rendered against the plaintiff, or upon the bond upon which the plaintiff was surety, or upon the application for the bond, containing the indemnifying agreement on the part of the defendants. It is insisted by the demurrer that if the suit is based upon the application, the petition should be dismissed, because the application was extinguished when the bond was issued, and could not serve as a cause of action against the defendant, having been merged in the bond; that if the action is based upon the bond, it fails, because the bond was merged in and extinguished by the judgment; that if the suit is based upon the judgment, it should be dismissed, because it does not appear that the judgment was ever assigned to the plaintiff, and because the action is barred by the statute of limitations; that if the cause of action is for money paid for the use of defendants, it is likewise barred by the statute of limitations. The demurrer raised the further objection that the contract made by the defendants with the school trustees is not set forth in or attached to the petition. The demurrer was overruled. The defendants answered, admitting the execution of the bond and the application, copies of which were exhibited with the petition. The answer also admitted the recovery of a judgment in the State of Florida, and contained the special defense that on May 28, 1901, the defendants filed their petition in bankruptcy and were duly adjudged bankrupt, and on October 5, 1901, were discharged in bankruptcy.

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The case was submitted to the presiding judge, without the intervention of a jury, upon an agreed statement of facts. The amount of liability was agreed upon, if the defendants were liable at all. It was further agreed that on November 9, 1900, the defendants abandoned their contract with the trustees of the school in Florida for the erection of the school house referred to in the bond executed by the plaintiff as surety; that immediately thereafter the trustees took charge of the building, and on April 13, 1901, completed it, and that on May 14, 1901, they gave notice of its completion to the plaintiff and the surety on the bond referred to, and made demand upon the surety for payment of the amount that they had expended upon the building in excess of the contract price; that on May 28, 1901, the defendants filed a voluntary petition in bankruptcy, and on the same day were duly adjudged bankrupt; that in the schedule attached to the petition it was recited that in April, 1900, the defendants entered into a contract for the building of the school house referred to in the bond; that to guarantee the completion of the contract the bond was executed, with the plaintiff as surety thereon; and that the school board terminated the contract by taking charge of the building and completing it. It was recited in the bankrupts' schedule that, "Whether or not there will be any liability on said bond petitioner is unable to say, as the matters involved in said contract and said building and the termination thereof have not been adjusted." In the schedule of creditors whose claims were unsecured appeared the name of the plaintiff, with the statement that the petitioner's liability to the surety company was fully described in another schedule, referred to above. On July

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31, 1901, the trustees of the school proved their claim in the bankrupt court for $6,876.08, for money expended in building in excess of the contract price. No dividend was paid to creditors, the assets (amounting to about $301) being consumed in the administration of the estate. On September 20, 1901, the defendants filed their petition for discharge in bankruptcy, and on October 5, 1901, an order of discharge was duly granted. Upon this agreed statement of facts a judgment was entered against defendants for the amount which had been agreed upon as the amount of their liability if they were liable. They excepted to the overruling of the demurrer, and to the final judgment.

60 POTTLE, *J.*:

1. There is no merit in the demurrer. The cause of action declared upon is clearly for the breach of the indemnity agreement embodied in the application for the bond. This agreement and the payment of the premium mentioned in the application constituted the consideration for the execution of the bond. The agreement was certainly not extinguished by the execution of the bond, for upon its face it was to have no force and effect unless the surety company became liable on its undertaking. It is true that the principals in the bond would have been liable over to the surety upon an implied obligation to reimburse it for any loss it might have sustained, even though no express agreement to this effect had been made, but there was certainly no legal objection to the execution of an express agreement, in consideration of the execution of the bond, to do that which the law would have compelled the principals to do without an agreement. The petition set forth a cause of action of the nature above indicated; and it was not barred by the statute of limitations, nor was it subject to any of the grounds of demurrer filed by the defendant.

2. The only remaining question is whether or not the defense of discharge in bankruptcy was good; and this question depends upon whether the plaintiff's claim was a debt provable in bankruptcy, within the meaning of the bankrupt act. Debts which are
61 provable in bankruptcy are classified in § 63 of the bankrupt act, which is as follows: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition

and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

62 Collier, Bankruptcy (9th ed.), 1355. Unless a debt is an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in § 63, supra, as "provable" debts, whether actually presented or not, it is not defeated by the discharge in bankruptcy. Remington, Bankruptcy, § 628. "And the question whether or not a debt is provable turns upon its status at the time of the filing of the petition." Remington, Bankruptcy, § 629. In re Pettingill, 14 Am. Bankr. R. 728 (137 Fed. 134, 840, 70 C. C. A. 338). There is a distinction between provable debts and allowable debts. A debt is, of course, not allowable unless it is provable, but it may be provable without being allowable. Allowability implies not only provability but also validity. If for any reason the claim is improper, or if there be a good defense to it, it is not allowable, although it may be provable as a debt. Remington, Bankruptcy, § 632. Generally, contingent claims are not provable, although some classes of unliquidated demands may be proved in bankruptcy. Mr. Remington thus states the rule: "The test as to whether a claim is really contingent or is simply unliquidated or unascertained by legal proceedings would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may

63 not yet have been ascertained by the consideration of a court as evidenced by judgment or decree, nor even the full extent of damages arising been already suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts nor a contingency as to the extent of the damages resulting from the injury. Again, so long as it remains uncertain whether a contract or liability will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt." Remington, Bankruptcy, § 641. A distinction must be drawn between a contract of indemnity and a contract whereby one person obligates himself to pay another's debt. In the case of a mere contract of indemnity, no action can be maintained for a breach until actual payment by the obligee. The distinction has thus been stated by our Supreme Court in a case where a partner retired and the partner remaining obligated himself to pay the debts of the firm. Upon this point, the court said: "the contract entered into between the plaintiff and the defendant at the time the firm dissolved was one by which the defendant obligated himself to pay the debts of the firm, and in such a case there is a breach of the contract whenever the partner agreeing to pay the debts fails to do so, and the outgoing partner can maintain a suit without having paid

64 anything himself. The rule is otherwise when the contract is simply one of indemnity, or to hold the partner harmless;

in which case no right of action arises in favor of the outgoing partner until he has either paid voluntarily or been compelled to pay debts against the payment of which he has been indemnified." Tucker v. Murphey, 114 Ga. 662, 663 (40 S. E. 836). See, also, to the same effect, Harvey v. Daniel, 36 Ga. 562, where it is distinctly ruled that when a mere indemnity bond is given against the payment of money, the plaintiff, in order to recover for a breach, must show loss or damage sustained by the actual payment of the money, or that which the law considers equivalent to an actual payment. The existence of a mere legal liability to pay not being sufficient. This distinction has received well-nigh universal recognition. See 16 Am. & Eng. Encyc. Law (2d ed.), 178, 22 Cyc. 79. In Wicker v. Hoppock, 6 Wall. 94 (8 L. ed. 752), the Supreme Court of the United States drew the distinction very clearly between the two classes of contracts, and said that in a contract of indemnity the obligee could not recover until he had been actually damnified, and then only to the extent of the injury he had sustained up to the time of the institution of the suit, but in the case of an agreement to pay, recovery might be had as soon as there was a breach of the contract, and the measure of the damages should be the full amount
65 agreed to be paid. See, also, Sapp v. Faircloth, 70 Ga. 690, 693, and Thomas v. Richards, 124 Ga. 942 (53 S. E. 400). If at the time of the filing of the petition the liability of the bankrupt is fixed so that upon the happening of a contingency the amount could be ascertained by computation, it is a provable claim, if the contingency happens in time to prove the claim under the act, and such a claim may be liquidated, if necessary in the bankrupt court. Loveland, Bankruptcy, 598.

The decisions are not entirely in harmony in reference to the provability of claims of a somewhat similar nature to the one involved in the present case. In Insley v. Garside, 10 Am. Bankr. R. 52 (121 Fed. 699, 58 C. C. A. 119), the court declined to allow the surety on a bankrupt's bond to prove his claim. In Wood v. U. S., 16 Am. Bankr. R. 21 (143 Fed. 424), the court expressed the opinion that the claim of a surety might be proved and liquidated in the bankrupt court, because at the time of the filing of the petition the liability to the surety had been incurred. In Clemmons v. Brinn, 7 Am. Bankr. R. 714, (36 Misc. Rep. 157, 72 N. Y. Supp. 1066), it was held that the liability of the defendant upon a replevy bond given to a sheriff was too contingent to be provable against the defendant's estate in bankruptcy. In re Roth & Appel, 181 Fed. 667 (104 C. C. A. 649, 31 L. R. A.
66 (N. S.) 270), the Court of Appeals for the Second Circuit held that a lease which provided that in case the lessee should be declared bankrupt the lease should terminate, and the lessor should have the right to re-enter, and that in such case the lessees should indemnify the lessor for any loss of rents during the remainder of the term, does not create a fixed liability absolutely owing at the time of the filing of the petition, and that the liability is altogether too contingent to be provable in bankruptcy. The plaintiff in error relies upon Loeser v. Alexander, 24 Am. Bankr. R. 75 (176 Fed. 265, 100 C. C. A. 89), decided by the Circuit Court of Appeals,

Sixth Circuit. In that case it was held that where a deputy collector of taxes executed to the treasurer a bond to faithfully discharge all the duties required of him by law, and honestly and faithfully pay over to the treasurer all moneys collected by him, the bond was a personal bond to the county treasurer, who had a right to proceed thereon in his own name, and the liability of the bankrupt upon the bond was not contingent nor unliquidated, but a fixed liability under the bankrupt act, absolutely owing at the time of the filing of the petition against him, the liability having become fixed upon the failure of the deputy to make payment of the money collected. The distinction between that case and the one now in hand seems to be obvious. The obligation of the deputy was to pay, and the
67 amount he was to pay was absolutely fixed and determined at the time the petition in bankruptcy was filed. Reliance is also placed upon the decision in re Lyons Sugar Company, 27 Am. Bankr. R. 610 (192 Fed. 445). In that case, however, it appeared that the liability was absolutely fixed and definitely ascertained at the time the petition in bankruptcy was filed, although the surety was not compelled to pay the amount stipulated in the bond until some time after the filing of the petition. The obligation in that case was to pay costs of an appeal. It was held that by the affirmance of the judgment appealed from, the claim became "liquidated by litigation," within the meaning of the bankrupt act.

The question whether the contract is strictly one of indemnity or an absolute obligation to pay the debt of another depends upon the construction of the contract. "Indemnity" has been defined as the "obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit." 22 Cyc. 79. Here the obligation was to indemnify the plaintiff "against all loss, costs, damages, charges, and expenses whatever, resulting from any act, default or neglect" of the principals in the bond, that the surety "may sustain or incur" by reason of the execution of the bond. It is insisted that the word in-
68 cur should be given its ordinary meaning, "to become liable for." See Bank of Indian Territory v. Eckles, 18 Okla. 159 (91 Pac. 695). Several authorities are relied on by the plaintiff in error to sustain this view. Most of them are clearly distinguishable from the present case. For instance, in Jarvis v. Sewall, 40 Barb. 449, the obligation was to pay any sum which the surety "might incur and become bound to pay by reason of having executed the appeal bond." It was held that in order to recover upon the indemnity bond, it was not necessary to show that the surety had actually paid the costs incurred on the appeal in reference to which the bond was given. The case turned upon the construction of the words "become bound," and they were held to be synonymous with to "become liable for," or "liable to pay." So in McBeth v. McIntyre, 57 Cal. 49, where a similar ruling was made, the obligation of the indemnity bond was against all damages, expenses, costs, and charges, and against all loss and liability which the surety might incur. That case turned upon the meaning of the word "liability." The case of Jones v. Childs, 8 Nev. 121, is very similar. The con-

struction contended for by the plaintiff in error does find support in the case of Smith v. Howell, 6 Exch. 730 (86 Rev. Rep. 452), and Mewburn v. Mackelcan, 19 Ont. App. 738.

We do not think that under a proper construction of the indemnity contract, the principals in the bond became liable to the surety until the surety had actually sustained a loss by payment of
69 some sum of money which it had been compelled to pay on account of the neglect or default of the contractors. At the time the petition in bankruptcy was filed the surety had not sustained or incurred any loss or damage on account of the contractors' default. It is true the default had taken place, and it is also true that the building had been completed by the trustees, and they were probably in a position to ascertain the exact amount of the contractors' liability, but no judgment fixing the amount of the contractors' liability had been obtained. The only information that the surety could have had on the subject was the claim made by the trustees of the school; and it could not know but that the contractors might have a good defense to the claim, or some part of it; and no judgment was rendered fixing the liability of the contractors until nearly three years after they were discharged in bankruptcy. But the question to be considered is as to the nature of the surety's claim against the bankrupt. The bankrupt owed the surety nothing at the time the petition in bankruptcy was filed, because the surety had paid nothing for their benefit and the relation of debtor and creditor did not exist between them until after actual payment by the surety. The only thing the surety could have done would have been to file in the name of the trustees their claim against the bankrupt, in order to have reduced its own liability by whatever might have been
70 recovered out of the bankrupt's estate. The surety had no claim against the bankrupt which it could file in its own name, and the trustees did file their claim, although no dividends were received, the assets being insufficient for this purpose. The liability to the surety by the bankrupt was altogether contingent and might never have arisen. Indeed we hold that at the time the petition in bankruptcy was filed the surety had no claim or debt against the bankrupt which could have been proved in the bankrupt court under § 63 of the bankrupt act. The result of this conclusion is that the judgment of the trial court in the plaintiffs' favor must be affirmed.

71 Court of Appeals of the State of Georgia.

4270.

ATLANTA, *October* 9, 1912.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered: R. P. Williams & Co. et al. v. United States Fidelity & Guaranty Co.

This case came before this court upon a writ of error from the city court of Atlanta; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Bill of costs, $10.00.

72 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, *Atlanta, December* 9, 1912.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of R. P. Williams and J. B. Carr, partners under the firm name of R. P. Williams and Company, plaintiffs in error, v. United States Fidelity and Guaranty Company, defendant in error, which are required by the præcipe of the plaintiffs in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 23,468. Georgia Court of Appeals. Term No. 403. R. P. Williams and J. B. Carr, as partners under the firm-name of R. P. Williams & Company, plaintiffs in error, vs. United States Fidelity and Guaranty Company. Filed December 21st, 1912. File No. 23,468.

FILED
APR 14 1914
JAMES D. MAHER
CLERK

In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1913.

No. 80

R. J. WILLIAMS AND J. B. CARR,
Plaintiffs in Error,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF GEORGIA

KING & SPALDING,
GREEN, TILSON & McKINNEY,
Attorneys for Plaintiffs in Error.

ALEX. C. KING,
J. BOWELL GREEN,
Of Counsel for Plaintiffs in Error.

(23,468)

Supreme Court of the United States

OCTOBER TERM, 1913,

No. 403.

R. P. Williams and J. B. Carr,
as Partners under the firm name of R. P. Williams & Company,
Plaintiffs in Error

versus

United States Fidelity and Guaranty Company
Defendants in Error

IN ERROR TO THE COURT OF APPEALS OF GEORGIA

Brief for Plaintiffs in Error

STATEMENT OF THE CASE.

On August 15, 1911, United States Fidelity & Guaranty Company brought suit in the City Court of Atlanta, in Fulton County, Georgia, against R. P. Williams and J. B. Carr, as partners under the firm name of R. P. Williams and Company, for the recovery of the sum of $6,674.23.

The petition charges that plaintiff on or about March 29, 1900, executed a bond in the penal sum of $7,500.00, on behalf of said firm of R. P. Williams & Company, and in favor of certain named persons, trustees of sub-school district No. 26, of Alachua County, Florida, to guarantee the faithful performance and completion of a contract for the construction of a district school building at Gainesville, Florida;

That contemporaneously with the execution and delivery of said bond and as a condition thereto, the said R. P. Williams and

Company executed under seal and delivered to plaintiff a written application for said bond, in which R. P. Williams & Company obligated themselves to indemnify the United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever resulting from any act, default or neglect of R. P. Williams & Company, that United States Fidelity & Guaranty Company might sustain or incur by reason of its having executed said bond; and, in the event said R. P. Williams & Company should be unable to complete or carry on said contract, to assign such plant as they might own, or have upon said work, to said United States Fidelity & Guaranty Company, that it might use the same in the prosecution of said work to completion; and that, in the event of any breach or default on the part of said R. P. Williams & Company of the provisions of said contract, the United States Fidelity & Guaranty Company, as surety on said bond, should be subrogated to all the rights and properties of said R. P. Williams & Company, as principals, in said contract, and that deferred payments and any and all moneys and properties that might be due and payable to R. P. Williams & Company, at the time of such breach or default or that might thereafter become due and payable to them on account of said contract, should be credited upon any claim that might be made upon United States Fidelity & Guaranty Company under said bond;

That on July 1, 1904, judgment was rendered in the Circuit Court of the United States for the Southern District of Florida in favor of said trustees of said school district against said United States Fidelity & Guaranty Company, as surety upon said bond, and that said surety, on February 20, 1905, paid in full satisfaction of said judgment $5,475.36, and that said surety had incurred certain other items of expense in the defense of said suit, which, added to the amount paid on said judgment, aggregated $6,674.23, the sum sued for, with interest. (Transcript pp. 10-12.) Exhibits of said bond and application are attached to the petition. (Transcript pp. 12 and 14.)

R. P. Williams and J. B. Carr, as partners under the firm name of R. P. Williams & Company, filed their plea and answer to said petition, the only part material to the case at bar being the plea setting up the discharge in bankruptcy of R. P. Williams, J. B.

Carr and R. P. Williams & Company as a bar to the suit of plaintiff. It is alleged in said plea that on the 28th day of May, 1901, R. P. Williams & Company filed their voluntary petition in bankruptcy, praying that said firm and the individual members thereof, towit, R. P. Williams and J. B. Carr, be adjudged bankrupt, and that on the same date said firm and each member thereof were, by order of the Court, so adjudged bankrupt; that the claim of United States Fidelity & Guaranty Company sued upon was scheduled in said bankruptcy proceedings; that the claim sued upon was one from which defendants were discharged by their discharge in bankruptcy; that R. P. Williams, J. B. Carr and R. P. Williams & Company filed their petition for discharge in bankruptcy on September 20, 1901, and that each was granted a discharge on October 5, 1901. (Transcript pp. 19-21.)

By amendment to their plea, defendants alleged that they were unable to complete the construction of the school building referred to in plaintiff's petition, and on November 9, 1900, so notified the trustees of said school, and also notified the architects for said building, and then abandoned said building; that said trustees then took charge of said building, and completed the same on April 13, 1901; that on May 9, 1901, the amount expended by said trustees in completing said building, in excess of the contract price, was audited by said architects and ascertained, and on the 14th day of May, 1901, said trustees notified United States Fidelity & Guaranty Company of the completion of said building, and demanded of said Company the amount expended by them for the completion of said building. (Transcript p. 21.)

By another amendment to this plea, defendants alleged that the trustees of said school proved their claim in bankruptcy, which arose upon the breach of said bond, against the defendants. (Transcript p. 22.)

A stipulation was signed by counsel for plaintiff and counsel for defendants, agreeing that the judge should try said case without the intervention of a jury, and pass upon both the law and the facts, each party reserving the right of exception, and also agreeing upon the facts, those material to the hearing before this court

being as follows: That R. P. Williams & Company abandoned the contract for erection of said school building on the 9th day of November, 1900; that the trustees for said school immediately took charge of said building, and completed the same on the 13th day of April, 1901; that on the 14th day of May, 1901, said trustees notified said surety of the completion of said building, and made demand upon it for payment of the amount expended upon said building in excess of the contract price; that on May 28, 1901, R. P. Williams & Company filed a voluntary petition in bankruptcy in the United States District Court, for the Northern District of Georgia, praying that said firm and the individual members thereof be adjudged bankrupt, and that on the same date the Court passed an order adjudging R. P. Williams & Company, R. P. Williams and J. B. Carr bankrupt.

The statement of facts sets out portions of Schedule A-2, filed by bankrupts, showing claim in favor of said trustees and also in favor of United States Fidelity & Guaranty Company, and it further shows that R. P. Williams & Company, R. P. Williams and J. B. Carr received their discharge in bankruptcy on October 5, 1901. (Transcript pp. 22-24.)

On April 20, 1912, the Court entered a judgment finding in favor of plaintiff and against defendants in the sum of $6,371 principal, $3,176 interest to date, and costs of suit. (Transcript p. 24.)

The defendants then presented to the court their bill of exceptions to the above stated judgment of the court, which was certified by the court on May 18, 1912. (Transcript pp. 8-9.)

The record was then certified by the clerk, and transmitted to the Court of Appeals of Georgia. (Transcript p. 24.)

The judgment of the trial court was affirmed by the Court of Appeals October 9, 1912. (Transcript p. 32.)

R. P. Williams and J. B. Carr, as partners under the firm name of R. P. Williams & Company, then presented their petition for a writ of error out of this court, which was granted, said writ issued, citation issued and service acknowledged by counsel for defendant in error. (Transcript pp. 1, 2, 3, 4.)

ASSIGNMENTS OF ERROR.

There are six assignments of error as follows:

1. Because the said Court of Appeals of the State of Georgia erred in ruling that, under the Act of Congress establishing a uniform system of bankruptcy, and the amendments thereto, the said debt or claim sued on by the plaintiff in the court below in this case was such a contingent liability of said defendants in said suit that the same was not provable in bankruptcy, and was not discharged by the discharge in bankruptcy of said defendants;

2. Because the said Court of Appeals of the State of Georgia erred in ruling that the discharge in bankruptcy of the defendants in the trial court, plaintiffs in error here, was not a sufficient defense against the claim or demand sued on in this case, under the provisions of the Act of Congress establishing a uniform system of bankruptcy, and the amendments thereto;

3. Because the facts in said case, as agreed upon, show that the said claim or demand sued on was barred by the discharge in bankruptcy of plaintiffs in error, and the said Court of Appeals of the State of Georgia erred in not so ruling, and in its construction of the said Act of Congress and the amendments thereto;

4. Because the said Court of Appeals of the State of Georgia erred in its construction of the said Act of Congress, establishing a uniform system of bankruptcy, and the amendments thereto, in their application to the facts in this case, and to the contract sued on in this case, in that said Court of Appeals construed said contract, under said statutes and under said agreed facts, as not being such a contract or liability as was, under said agreed facts, barred by the discharge in bankruptcy of the plaintiffs in error pleaded in said case;

5. Because, under the agreed facts in this case, the contract of liability sued on was discharged and barred, under the Act of Congress, establishing a uniform system of bankruptcy, and the amendments thereto by the discharge of the plaintiffs in error,

and said judgment, holding the said plaintiffs in error liable thereto, despite their plea of discharge in bankruptcy, was error; and

6. Because the said Court of Appeals of the State of Georgia erred in not reversing the judgment of the trial court, and in not giving to the plaintiffs in error their rights under the statutes and laws of the United States, as set up in their plea of discharge in bankruptcy filed in the trial court. (Transcript p. 6).

BRIEF OF LAW.

I.

The purpose of the Bankruptcy Act and of all insolvency laws is to distribute the assets of the bankrupt fairly and equitably among his creditors, and at the same time to discharge the bankrupt from his debts and liabilities, and enable him to take a fresh start in life, freed from his burden of debt.

Allen vs. Ferguson, 85 U. S., 18 Wallace, 1, 4.
Wiswall vs. Campbell, 93 U. S., 347, 350.
Fraer vs. Clews, 115 U. S., 528, 541.
Wetmore vs. Markoe, 196 U. S., 68, 77.
In re Gerson, 6 A. B. R., 12.

In Wetmore vs. Markoe, Supra, the Court says: "Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness, which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes."

Bankruptcy Acts should be liberally construed in favor of honest debtors.

Mims vs. Lockett, 20 Ga., 474 (4).
Black on Interpretation of Laws, p. 302.

The author says: "The construction should be strict as to the imposition of penalties, liberal as to the powers of the assignee and as to the rights of creditors, and liberal as to the discharge of an honest debtor."

II.

Before considering the main question in this case, the court's attention is directed to a few definitions and general rules:

(1). Section 1 (11) of the Bankruptcy Act of 1898 defines the word debt as follows: " 'Debt' shall include any debt, demand, or claim provable in bankruptcy." The term "debt" as here used is not limited to its common law meaning. 1st Loveland on Bankruptcy, section 289. 1st Remington section 627.

(2). Attention is called to the distinction between the words "provable" and "allowable" as applied to claims in bankruptcy proceedings. A claim may be "provable" and not "allowable," and the test for release from a debt by a discharge in bankruptcy is "provability," not "allowability." 1st Loveland, p. 707; 1st Remington, p. 374; Hagardine-McKittrick Co. vs. Hudson, 10 A. B. R., 225.

(3). Under section 17 of the Act of 1898.

"A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as

"(1) United States and state taxes. Are due as a tax levied by the United States, the state, county, district, or municipality in which he resides;

"(2) Liability in actions for fraud. Are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

"(3) Claims not scheduled. Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

"(4) Created by fraud. Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The claim sued on does not fall in either one of the excepted

classes. Then the proper decision of this case turns upon the question whether or not the claim sued upon was a valid, existing claim, subject to proof in bankruptcy, at the time that the petition in bankruptcy was filed by R. P. Williams & Company. Section 63-A of the Act of 1898 specifies the several classes of provable claims, and our contention is that the claim in question falls under sub-section 4 of Section 63-A. Under the terms of "Exhibit B" (Transcript p. 16) there is an express contract on the part of R. P. Williams & Company to indemnify the United States Fidelity & Guaranty Company "against all loss, costs, damages, charges and expenses whatever, resulting from any act, default or neglect of ours that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof." R. P. Williams & Company defaulted and failed to comply with this contract for the construction of the Alachua County school building. The trustees took charge of the building and completed it at a cost in excess of the contract price. The instant this was done a loss was **incurred** by United States Fidelity & Guaranty Company under its bond to the trustees. It was then liable to the trustees. At the same instant R. P. Williams & Company became liable to United States Fidelity & Guaranty Company for this loss **incurred** by it under said bond. All this happened before the Plaintiffs in Error filed their petition in bankruptcy. But Defendant in Error contends that Plaintiffs in Error owed it nothing until it actually paid the loss **incurred** by it under the bond and by reason of the default of Plaintiffs in Error, and that this was not done until after the discharge of Plaintiffs in Error. The following authorities hold to the contrary:

1st Remington, Sections 644, 645;
Lewis vs. Crockett, 3 Bibb (6 Ky.), 197;
Ramsay vs. Jervais, 2 Bay (S. C.), 145;
Rockefeller vs. Donally, 8 Cow. (N. Y.), 629;
Garrett & Hill vs. Logan, 19 Ala., 346;
Banfield vs. Marks, 56 Ala., 185 (4);
Loeser vs. Alexander, 24 A. B. R., 80-81.
1st. Loveland on Bankruptcy, p. 627;

It is not necessary that a claim should be liquidated in order

to be provable. If the claim in question falls within Section 63-A (4), though unliquidated at the time the petition in bankruptcy was filed, it could have been liquidated under 63-b, and proven, all facts **necessary** to the liquidation having then transpired and being ascertainable; that is default having been made by Williams & Company, the trustees having completed the building and the amount expended by them in excess of the contract price, being ascertained. The loss had been suffered by the trustees, and theforefore **incurred** by the surety, and when **incurred** by the surety, though not paid, under the express contract of R. P. Williams & Company (Transcript p. 16), they became liable to the securty, and the claim against them and in favor of the surety was provable in bankruptcy.

1st Remington, Sections 641, 642, 643, 644;
Grant Shoe Co. vs. Laird, 212 U. S., 445, 447, 448;
Mace vs. Wells, 7 Howard, 272.
Dunbar vs. Dunbar, 190 U. S., 340, 345.
Riggin vs. Maguire, 82 U. S. (15 Wallace), 549.
Crawford vs. Burke, 195 U. S., 176, 193.

The cases of Dunbar vs. Dunbar and Riggin vs. Maguire, cited above, illustrate the distinction between contingent claims that are provable and contingent claims that are not provable. In the Riggin case the Court say:

> "It is claimed that, under the right here given to prove uncertain and contingent demands, this claim could have been proven. But the better opinion is that as long as it remains wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the Act of 1841."

In the case at bar the uncertainty referred to had been removed when Williams & Company filed their petition in bankruptcy. They had made default in their contract with the school trustees. The trustees had completed the building, and made demand on the surety. **All facts necessary to calculate the amount to be**

paid had occurred. The duty or liability to pay had been incurred by the surety, and the actual liability had thus arisen against Williams & Company to indemnify the surety against the liability incurred by it. The mere fact that the surety refused to pay and litigated the claim does not change the character of the claim from a provable to non-provable claim. Under 63-b the surety could have liquidated this claim in the bankruptcy court as well as in Circuit Court in Florida.

1st Remington, Sections 712, 713, 714;
1st Loveland, pp. 600-602.

III.

While the Act of 1898 does not provide, in terms, for proving contingent claims, as did the Act of 1841, under section 63-a, taken in connection with 63-b, contingent claims may be proved. The expression "unliquidated claims" is used in the Act of 1898 in the same sense as "Contingent Claims" under the Act of 1841. While the previous Act expressly provided for the proof of Contingent Claims, it was held by this court that certain contingent claims could not be proved, because it was wholly uncertain at the time of bankruptcy whether a duty or liability would ever arise under them.

Riggin vs. Maguire, 82 U. S., (15 Wallace) 549.

If the facts necessary to fix liability had transpired, though the amount of the liability had not been determined, the claim was provable. The same is true under the present Act.

Mace vs. Wells, 7 Howard, 272.
In re Gerson, 6 A. B. R., 11.
In re Smith, 17, A. B. R., 112.
In re James Dunlap Carpet Co., 20, A. B. R., 882.

In re Caloris Manufacturing Co., 24 A. B. R., 609. Special attention is directed to the last case cited, as it criticises Re Roth and Appel (p. 611), which was strongly relied on by Counsel for Defendant in Error both in the trial Court and in the Court of Appeals. In the same connection, see 1st Loveland, p. 609, where

the author criticises the ruling in the Roth and Appel case in the following language: "It has been suggested that these words" (referring to the words "a fixed liability" in 63-a) "should be read into the fourth clause as a limitation on contract debts. If Congress had intended to so limit the fourth clause it would have been easy to have said so. The fourth clause is clearly limited to debts at the time of bankruptcy. The obligation to pay must be fixed and the amount ascertainable at that time, although the debt may not become owing until the happening of some event. Such claims are debts founded on contract, in which the rights of the parties are absolutely fixed as between them at the time of filing the petition."

See also the following:

1st Loveland, Section 295;
1st Loveland, Page 598;
1st Loveland, Section 310;
In re Stern-Manhattan Ice Co.;
8 A. B. R., 569.

IV.

It is contended by Defendant in Error that, at the time the petition in bankruptcy was filed by Williams & Company, it had no provable claim, because it had paid the Trustees of the school district nothing under the bond on account of the default of Williams & Company, and therefore Williams & Company owed it nothing. It says that the contract set out in the application by Williams & Company for the bond (Transcript 16), upon which its suit is based, is an independent contract, in no way connected with its liability under the bond. We think the authorities already cited refute this contention. No claim could have arisen in favor of Defendant in Error under the application without there first having been a breach of the bond by Williams & Company, and the law raised the liability of Williams & Company the instant the breach occurred, regardless of the contract contained in the application for the bond. This contract only expressed what the law already implied.

27 Am. & Eng. Enc. (2nd Ed.), page 468 IV;
1st Remington, Section 644;
Wood vs. United States Fidelity & Guaranty Co.;
16 A. B. R., 21, 23.

The Court's special attention is directed to the last case cited, as it involves the same contract here sued on. The present Defendant in Error was there contending for the same construction of the contract that Plaintiffs in Error now contend for, and the Massachusetts Court in sustaining the then contention of Defendant in Error, but present contention of Plaintiffs in Error, says:

> "When King gave up the performance of the work he had contracted to do, he committed a breach of the conditions of the bonds whereon the defendant was his surety and thereby incurred a liability to the defendant founded upon the indemnity agreement. The amount of the liability may not then have been fixed nor capable of being then fixed and it may have depended to some extent upon contingencies, but the defendant seems to me to have then acquired a claim provable though not liquidated, and such as makes it a creditor within the meaning of Section 60."

In this case the Court points out the measure of the surety's damage, and states that the rights of the surety are to be determined as of the time that the contract was signed.

V.

It is contended by Defendant in Error that the contract sued on is one purely of indemnity, and that damage must be shown before an action will lie, and that as Defendant in Error had paid ..othing at the time of bankruptcy, it could not have sued, and therefore could not have proved its claim. Under the authorities above cited as to provability of claims, this contention is unsound. There are certain contracts of indemnity which undoubtedly would require a payment by the indemnitee before his cause of action would arise against the indemnitor, but this con-

tract does not fall within that class. The contract involved in the case at bar is more than one of mere indemnity against **damage sustained.** It will be noted that the contract says Plaintiffs in Error shall "indemnify United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever resulting from any act, default or neglect of ours, that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof." Note the two words, "sustain" and "incur," and contrast them. The word "sustain" means to "suffer" or "undergo," and in this connection means that before "loss, costs, damages, charges and expenses" could be "sustained," they must be paid. But "incur" means to become "liable for," and "loss, costs, damages, charges and expenses" are "incurred" whenever one becomes liable therefor, and not when paid. In the case of Smith vs. Howell, 6 Ex., 739, 86 Revised Reports, 458, Platt, B., says: "It is contended, that the time for the performance of the defendant's covenant is not yet arrived; but that is not so, for by the words of his covenant he is to save the plaintiff harmless from all costs, damages and expenses which might be incurred. When does that liability arise? Surely when the demand is actually made. The plaintiff therefore may maintain his action, although he has not himself as yet paid any of these charges."

And in the same case, Pollock, C. B., on page 737, 6 Ex., and on page 456, Revised Reports, says: "There is no doubt that, at one time, very wild notions were entertained with respect to the contract of indemnity; but these notions are now exploded, and it is now considered, that, by a contract of indemnity, is meant that the party indemnified may recover all such charges as necessarily and reasonably arise out of the circumstances under which the party charged became responsible." In the case of Flanagan vs. B. & O. Ry. Co., 83 Iowa, page 643 (V), the Court says: "The language of the instruction above quoted directs the allowance of medical expenses paid out or incurred. Being in the alternative, it would be followed by allowing for medical expenses incurred (become liable for.—Webster's Dictionary) * * * * * * ." The case at bar involves exactly the same words and also in the alternative, and the same construction applies. Again, in Beekman vs. Van Dolsen, 70 Hun., page 294 (77 N. Y. Sup. Ct.), "The

guaranty is not against damage which may be suffered, but against cost and damage which may be incurred. Suffered means paid; incurred means become liable for." In Jarvis vs. Sewell, 40 Barb. (N. Y.), 449 (3), 459 (3), the Court says: "The obligation of the bond of indemnity attached upon the obligor's incurring or 'becoming bound' to pay the costs." The Court held that payment was not necessary before bringing suit. In Mewburn vs. Mackelcan, 19 Ont. App., 738, the Court say: "They were to save him harmless from all costs he might incur or be put to in connection with the liability. These latter words seem to me to point to liability to pay, although no actual payment be made." Boyd vs. Robinson, 20 Ont. Rep., page 407. In the course of the opinion, Boyd, C., says: "In commenting on the cases, it is said in Mayne on Damages, Fourth Edition, 307, judgment actually recovered against a party is always a damnification for the full amount to which it is given, even though payment has not been made under it. The strict construction of these contracts to be found in some earlier cases limiting to recovery for actual damage is not to be commended * * * * * *." In the case of Bank of Indian Territory vs. James R. Eckles, 19 Okla., 163, the Courts say: "The word 'incurred' is defined by Webster' as 'to become liable or subject to; to render liable or subject to,' " which definition was adopted by the Court. In the case of Cousins vs. Paxton & Gallagher Co., 122 Iowa, page 468 (near the bottom), the Court say: "The law recognizes a well defined difference between covenants of indemnity against loss, and covenants to assume a liability. In the former case the covenant is not broken, and no right of action occurs until a loss has been suffered against which the covenant runs, while in the latter class the covenant is broken, and the right of action occurs whenever the liability is fixed and absolute." This is a case where the word "sustained" was used alone, and the Court held that payment was necessary, but in doing so laid down the distinction above mentioned. In the case of Jones vs. Childs & Vansickle, 8 Nev., 124, the bond was to protect a Sheriff and "to indemnify him against any liability which he might incur thereby." The Court held that an action would lie when liability accrued, and that payment was not necessary. To the same effect see: Chace, Admr., vs. Hinman, 8 Wend. (N. Y.), 452; McBoth & Compton vs. McIntyre, 57 Cal., 50; Ham vs. Hill, 29 Mo., 278 (bottom of page); McNeal vs. City of Waco,

89 Tex., page 86; Smith vs. Teer, 21 U. C. Q. B., 412. In the case of Wood vs. United States, above cited, 16 Am. B. R., 23 (2), the Court, in construing this identical contract, uses the word "incurred" in the same sense that we now contend for, when it says: "When King gave up the performance of the work he had contracted to do, he committed a breach of the condition of the bonds whereon the defendant was surety and thereby incurred a liability to the defendant founded upon the indemnity agreement." That is exactly our case. It will thus be seen that by the express terms of the contract upon which Defendant in Error relies, the liability of Plaintiffs in Error to Defendant in Error became fixed and absolute, though unliquidated, when they committed a breach of the bond. It is perfectly clear from its own contract, that the Defendant in Error intended to cover and have itself indemnified against all possible damage or liability, whether sustained and paid, or merely accrued, the word "sustained" covering all cases where payment had actually been made, and the words "may incur" covering all cases in which Defendant in Error might become liable. It has even gone so far as to incorporate the word "charges" in its contract, which by no contortion of construction can imply a demand paid, but only a claim for which demand has been made.

VI.

In addition to what has already been said about proof of claims, it is to be noted that equitable claims, as well as legal claims, are subject to proof in bankruptcy. A surety always has an equitable claim against his principal, and can always go into equity to enforce it. In the case of Sanford vs. United States Fidelity & Guaranty Co., 116 Ga., pages 693 and 694, the Court says: "In the case of Howell vs. Cobb (Tenn.), 2 Coldw. 104, 88 Am. Dec. 591, it was held that a security on a guardian's bond was entitled in equity to be secured against loss before payment of the principal's debt; quoting 2 Story's Eq. Jur., Sec. 849, to the effect that if a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor, he may file a bill to compel the debtor to discharge the debt or other obligation for which the surety is responsible. * * * * * * The surety

is not required to sit still and await the pleasure of the creditor. * * * * * * 'The surety is in equity regarded as a creditor of the principal, and, upon the insolvency of the latter, may retain for his protection, even as against a bona fide purchaser, any assets in his hands belonging to his principal; otherwise a surety in such a case would be wholly without remedy, when the plainest principles of justice are in his favor. And this relation of debtor and creditor between principal and surety, so as to entitle the latter to avoid a voluntary conveyance by the former, commences at the date of the obligation of suretyship, and not from the time of payment of the debt, though until the latter event he has no technical cause of action against the principal, and consequently no right to be subrogated to the securities held by the creditor.' " It will thus be seen that equity is always open to protect a surety where the principal is insolvent or other similar conditions exist. In this case, the principal was undoubtedly insolvent, and unless the surety had a right to come in and prove its claim, the assets of the principal would have been distributed by the Trustee in Bankruptcy, and it would have been impossible for the surety to have participated in this distribution. Clearly the right to prove the claim existed as soon as default was made by the principal, which default occurred before the bankruptcy proceedings. It will be noted, 1 Remington, Section 611, that the surety always has the right to prove the claim of the creditor, although the creditor himself refuses to prove it. See also 1st Loveland, 625-626. This is ample protection to the surety, and, in fact, is all that he can do, for he really has no independent claim of his own; for, if such were the case, the principal creditor might prove his claim against the bankrupt, and the surety might come in and prove his claim, and thus we would have a double proof and a double participation in the assets of the bankrupt, where only one claim existed. As to right of surety to enforce his claim against the principal in equity, see also 32 Cyc., page 248.

Equitable claims are provable in bankruptcy. 1 Loveland on Bankruptcy, page 603.

The bankruptcy Court has equitable jurisdiction. 1 Loveland on Bankruptcy, pages 86 and 87.

VII.

When a claim is provable in bankruptcy, a discharge in bankruptcy is a bar to such claim in all cases where the claim is scheduled, or where the creditor has notice of the proceeding. Act of 1898, Section 7 (8) and 17 (3); Collier on Bankruptcy (8th Edition), page 308; 2 Loveland on Bankruptcy, pages 1369 and 1370. This is true, whether the claim be liquidated or unliquidated, and whether it be proved or not proved. 2 Remington, Sections 2732 and 2734; 1 Remington, Section 704.

VIII.

Section 58 of the Act of 1898 prescribes the notice to be given to creditors of the bankruptcy proceedings in its various stages. See 1 Remington, Section 565. The law presumes that the Referee has complied with all the requirements of the law, and has given all the notices specified, before passing any order in a bankruptcy proceeding. Winn, Admr., vs. Lunsford, 130 Ga., pages 438 to 440. It was not contended in the lower Court that the Defendant in Error had no notice of the bankruptcy proceedings, but certain remarks by counsel for Defendant in Error suggested to counsel for Plaintiffs in Error that such an argument might be made in this Court. For that reason, we furnish the authorities above cited. The record is silent on the question of notice, but the Court's attention is called to the fact that where it appears that a discharge has been granted a bankrupt, and this discharge is pleaded in bar to a suit, the burden is always on the creditor setting up a claim to attack the discharge, and show want of notice or any other defect, that will prevent the bar. 2 Remington, Section 2685; Broadway Trust Co. vs. Hanheim, 14 Am., B. R., page 123.

IX.

It was intimated by counsel for Defendant in Error in the argument of the case in the lower Court that the schedule set out by the bankrupts of the claim in question was not sufficient, though

this was not seriously contended. That the schedule is sufficient see the following authorities: 2 Loveland on Bankruptcy, pages 1371 to 1374; Anthony vs. Sturdivant, 27 Am. B. R., page 356 (Ala. Sup. Ct., November, 1911). Without admitting for an instant that the schedule is insufficient, but granting such, for the sake of argument nevertheless a claim in favor of the Defendant in Error was scheduled, with the address of the agent of Defendant in Error. Under the presumption already referred to, that the Referee gave the notices required by law, the agent of the Defendant in Error received notice of the bankruptcy proceedings, and this is all that the law requires.

Knowledge of agent is knowledge of principal. 2 Remington, Section 2779; 2 Loveland on Bankruptcy, page 1370.

X.

The Court's attention is called to the following rulings in re Barrager, 27 Am. B. R., page 366: "The fact that a bankrupt's schedule names certain persons as creditors is prima facie evidence that such persons are, indeed, creditors, so as to entitle them to oppose the granting of bankrupt's application for a discharge.

XI.

The Court's attention is directed to the fact that the claim against the bankrupts for the liability that arose on account of their breach of the contract with the School Trustees was actually proven in the Bankrupt Court by the Trustees of the School District.

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Supreme Court, U. S.
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BRIEF OF DEFENDANT IN ERROR

Supreme Court of The United States

OCTOBER TERM, 1913

No. 80

R. P. WILLIAMS AND J. R. CARR, AS PARTNERS UNDER THE FIRM NAME OF R. P. WILLIAMS & CO.

Plaintiffs in Error,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendant in Error

In Error to the Court of Appeals of the State of Georgia.

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Atlanta, Ga.
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JOHNSTON-DALLIS CO., ATLANTA, GA.

IN THE

Supreme Court of the United States

R. P. Williams et al.

vs.

United States Fidelity & Guaranty Company

No. 403
OCTOBER TERM, 1913

STATEMENT OF THE CASE.

This case is reported below in 11 Ga. App. 635.

Plaintiffs in error (hereinafter called principal), having breached a building contract for the performance of which bond was given with defendant in error (hereinafter called surety), as surety, were sued on their contract to indemnify their surety "against all loss, costs, damages, charges and expenses whatever, resulting from any act, default, or neglect" of theirs that said surety "may sustain or incur by reason of its having executed said bond."

After said breach, said building was completed by the owners at a heavy cost over the contract price, and the surety was sued therefor, and, after judgment, paid the same, together with its expenses of said litigation, and sued as aforesaid to recover said sums.

Between the breach of said contract and the payment of said judgment against it by the surety, and subsequent to the completion of said building, the principal went into voluntary bankruptcy and was discharged in regular course.

A plea of this discharge in bankruptcy was interposed as a defense to the suit of the surety on said indemnity contract. Under the agreed statement of facts the single Federal question in the case arises on this defense.

If the claim sued on under this contract of indemnity was provable in bankruptcy at the time the proceedings in bankruptcy were filed the defense is good; otherwise not.

The statement of the case in the brief of plaintiffs in error needs some slight elaboration. The attempt to schedule their liability on account of the construction contract, in their bankruptcy petition was in the following language:

> Under Schedule A2: "Creditors holding securities" the petitioners in bankruptcy filed the following: "In April, 1900, R. P. Williams & Company entered into a contract with the trustees of sub-school district Alachua County, Florida, to build a district school building. To guarantee the completion of this contract, the said R. P. Williams & Company gave a bond in the sum of $————, with the United States Fidelity & Guaranty Company as surety. On November 9, 1900, said school board terminated said contract by taking said building out of the hands of said R. P. Williams & Company. Whether or not there will be any liability on said bond petitioner is unable to say, as the matters involved in said contract and said building and the termination thereof have not been adjusted. Said school trustees are represented by a chairman, whose name is W. W. Hampton, Gainesville, Florida, said company is represented by W. H. Patterson, Atlanta, Georgia." Under Schedule A3, "Creditors whose claims are unsecured," the petitioners in bankruptcy filed the following: "United States Fidelity & Guaranty Company, of Atlanta, Georgia, W. H. Patterson, Agent, liability contracted in Atlanta in 1900. This liability is fully described under Schedule A2." [Trans. p. 23.]

BRIEF.

Bankruptcy Act of 1898, Section 17:

(a) "A discharge in bankruptcy shall release a bankrupt from all his provable debts" . . . . .

A "provable debt" means an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in Section 63 (a) as "provable debts."

Remington on Bankruptcy, Vol. 1, Section 628, p. 373.

And the question whether or not a debt is provable turns upon its status at the time of the filing of the petition.

Remington on Bankruptcy, Vol. 1, Section 629, p. 374.
Zavelo v. Reeves, 227 U. S. 625.

Bankruptcy Act 1898, Section 63; Debts which may be proved:

"a (1). A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

a (4). Founded upon an open account, or upon a contract express or implied.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 63 b adds nothing to the class of debts prescribed under 63 a. It merely permits the liquidation of an unliquidated claim provable under the latter provision.

Dunbar v. Dunbar, 190 U. S. 340.
Colman Co. v. Withoft (9 C. C. A.) 195 Fed. 250.
In re Roth & Appel (2 C. C. A.) 181 Fed. 673.

Also Section 63 a (4) is subject to the limitation contained in 63 a (1) that debts to be provable must be "absolutely owing at the time of the filing of the petition."

In re Swift (1st C. C. A.) 112 Fed. 316;
In re Adams (D. C. Mass.) 130 Fed. 381;
In re Roth & Appel (2nd C. C. A.) 181 Fed. 673.

Contingent claims are not provable under the Act of 1898.

Remington on Bankruptcy, Vol. 1, Section 640, p. 381;
In re Roth & Appel (2nd C. C. A.) 181 Fed. 673;
Coleman Co. v. Withoft (9 C. C. A.) 195 Fed. 250.

Contingent "is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility."

All anticipated future events, which are not certain to occur are contingent events, and may be properly denominated mere possibilities, more or less remote.

A "contingent claim" is one which has not accrued and which is dependent upon the happening of some future event.

Words & Phrases, Vol. 2, p. 1498.

Sureties and endorsers on commercial paper and others similarly situated have a provable claim against their bankrupt principal even though at that time there has been no default on the part of the bankrupt.

Remington on Bankruptcy, Vol. 1, Section 642, p. 383;
Remington on Bankruptcy, Vol. 1, Section 644, p. 384;
Remington on Bankruptcy, Vol. 1, Section 645, p. 386.

and cases cited.

But there is a very clear distinction between this class of cases and the case at bar, involving a surety for the "faithful performance" of a contract or duty by the bankrupt.

Remington on Bankruptcy, Vol. 1, Section 647, p. 389.

Such claims are contingent:

First, on a breach by bankrupt of the contract or duty.

Second, on actual pecuniary loss suffered by the surety as a consequence of said breach by the bankrupt.

And the existence of either or both of said contingencies at the time of the filing of the petition in bankruptcy renders the claim of the surety non-provable, and therefore unaffected by the bankrupt's discharge.

Goding v. Rosenthal, 6 A. B. R. 641 (Note); (Mass. Oct. 18, 1901), 61 N. E. 222;
Clemmons v. Brinn, 7 A. B. R. 714; 36 Misc. 157; 72 N. Y. Supp. 1066;
Insley v. Garside, (9th C. C. A.) 121 Fed. 699.

The distinction which reconciles the positions of both sides of this case and the authorities cited by them respectively, is that which exists between a contract assuming liability, and one indemnifying against loss. The terms of such contracts fix the law applicable to them respectively.

The distinction is clearly pointed out in the following cases:
Contracts assuming liability:

Fenton v. Fidelity Co., 36 Or. 283; 56 Pac. 1096; 48 L. R. A. 770;
Anoka Lumber Co. v. Fidelity Co., 3 Minn. 286; 65 N. W. 353; 30 L. R. A. 689;
Tucker v. Murphy, 114 Ga. 662; 40 S. E. 836;
Thomas v. Richards, 124 Ga. 942; 53 S. E. 400;
Mills v. Dows Adm'r, 133 U. S. 423, 432;
Johnson v. Risk, 137 U. S. 300, 308 and cits.

Contracts indemnifying against loss:

Carter v. Aetna Life Ins. Co., 76 Kan. 275; 91 Pac. 178; 11 L. R. A. (N. S.) 1155;
Allen v. Aetna Life Ins. Co., 145 Fed. 881; 76 C. C. A. 265; 7 L. R. A. (N. S.) 958, and note;
Connelly v. Bolster, 187 Mass. 266; 72 N. E. 981;
Harvey v. Daniel, 36 Ga. 562;
Wicker v. Hoppock, 6 Wall. 94;
Insley v. Garside, (9th. C. C. A.) 121 Fed. 699;
National Bank v. Bigler, 83 N. Y. (Ct. of App.) 62.

The contract recovered on in the case at bar is a contract of indemnity and falls within the latter class in all of which it is well nigh universally held that to recover for a breach, loss or damage must be sustained by actual payment of money, or its equivalent under the law.

16 Amer. & Eng. Encyc. of Law (2nd. Ed.) 178 (a) and notes;
22 Cyc. 79, 87, 90, 91, 92.

Indemnity means an obligation to make good a loss; no loss, no obligation.

ARGUMENT.

That a bankrupt is discharged only from his provable debts and that "contingent claims," so-called, are not provable debts and are therefore not discharged, we consider axiomatic and indisputable under the Bankruptcy Act of 1898. The entire difficulty in the question arises in the determination of what are "contingent claims," and therefore not provable debts. And in determining this question it must be considered as of the time of the filing of the petition in bankruptcy. This we take as an undisputed proposition of law. (See Zavelo v. Reeves, 227 U. S. 625.)

Now, first, let us see clearly what the principal contracts to do. He contracts to "indemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever resulting from any act, default or neglect of ours, that the said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond." This is the undertaking which the surety has enforced, and which the surety contends was, at the time of the filing of the petition in bankruptcy by the principal, a contingent claim pure and simple, therefore not provable in the bankrupt court, and therefore not affected by the bankrupt principal's discharge. This undertaking on the part of the principal imposes by its very terms no duty or liability of any kind whatsoever on the principal until the surety shall have actually sustained or incurred pecuniary loss. And the contingency of the surety's not sustaining or incurring pecuniary loss would be an absolute bar against the surety endeavoring to enforce said obligation on the part of the principal in advance of any pecuniary loss.

It is argued by counsel that the only contingency in the obligation is an act, default or neglect on the part of the principal, and that such act or default occurred in November, 1900, prior to the filing of the petition in bankruptcy, and that at the time of the bankruptcy the surety had a provable debt against its bankrupt principal whether or not said surety had sustained or incurred any loss, costs, damages, charges or expenses whatever. And that having such provable claim same was discharged and the surety cannot now maintain this suit against the principal's plea of discharge in bankruptcy. In partial refutation of this argument, let

us look at the language used by the bankrupt principal in scheduling their obligation to this surety. They go on to say: "Whether or not there will be any liability on said bond petitioner is unable to say, as the matters involved in said contract and said buildings and the determination thereof have not been adjusted." (Trans. p. 23.)

Under this statement if the surety had attempted to prove a claim in the bankrupt court, could the referee in bankruptcy have allowed it as a fixed liability, absolutely owing at the time bankruptcy proceedings began? Obviously not.

A case in many respects similar to the one at bar, where the surety on a bankrupt's bond endeavored to prove his claim in bankruptcy before he had incurred any pecuniary loss is that of Insley v. Garside, 121 Fed. 699 (U. S. C. C. A., 9th Circuit). In this case Garside, the defendant, with another, were sureties on an injunction and forthcomnig bond of the bankrupt conditioned to pay whatever judgment that may be entered against the bankrupt and to have certain property forthcoming, etc. A judgment for a fixed amount was rendered against the defendant, the principal on said bond, and subsequently he was put into bankruptcy. The sureties had secured themselves by chattel mortgage, and endeavored to prove their claim against the bankrupt estate based upon the bond and chattel mortgage, and their claim was allowed as a preferred claim to the extent of $584.00 in the court below. Judge Ross, in delivering the opinion of the Circuit Court of Appeals reversing the court below, said:

> "It is not pretended that the appellees have ever paid anything on the bond executed by them; and, in their petition for the payment of their claim out of the estate of the bankrupt in preference to all other claims, there is, so far as any unqualified admission of any liability on their part, a strong inference of a denial of any such liability."

Again:

> "Conceding that Mrs. Sharick's demand against the bankrupt, as established by the judgment against him, is provable in bankruptcy, it is her claim that must be proved. It was her claim against I. J. Sharick that was secured by the bond executed by the appellees. She is the creditor of the bankrupt, not the sureties of her debtor."

This case strongly negatives the contention of the principal that the surety's claim was, under Section 63 of the Bankrupt Act, an unliquidated claim under subdivision (b) of said section, and a debt founded upon a contract express, under Section 63, a-4.

Another case in point and practically on all-fours with the case at bar is that of Golding v. Rosenthal, 6 A. B. R. 641 (Mass.), 61 N. E. 222. In this case the surety endeavored to recover on the implied contract of the principal to indemnify him and the principal went into bankruptcy prior both to a breach of the bond and to any consequent pecuniary loss by the surety. Barker, J., in delivering the opinion says:

> "This obligation (contract of indemnity) was in force when the present defendant's petition in bankruptcy was filed. It was evidenced by an instrument in writing, and in one sense it was a fixed liability. But no debt was absolutely owing at the time of the petition. The obligation was contingent upon the happening of a breach of the bond **and** a payment by the surety. . . . . Therefore neither the obligee in the bond nor the surety could prove in the bankruptcy proceedings a claim founded upon the bond unless merely contingent claims are proven."

It is thus seen from an examination of this case and the preceding case of Insley v. Garside, that there are two contingencies which must happen before a surety's claim for indemnity is provable in bankruptcy against the principal. First, there must be a breach or default on the part of the bankrupt of his obligations under the bond, and, second, there must result from said breach or default some actual pecuniary loss or damage to the surety. When both of these contingencies have happened the surety has a provable claim against his bankrupt principal, and not until then.

The word "incur" in the contract recovered on is the single support of the contention of plaintiffs in error. When taken with the context it can not mean mere liability which may or may not result in loss; it must mean actual loss previously sustained. Hence the words "sustain or incur" as used in this contract are synonymous. The sentence analyzes thus: "Incur" is a verb, the objects of which in the sentence are "loss," "costs," "damages," "charges" and "expenses." Plaintiffs in error must interpolate

"liability for" between the verb and the objects of it to sustain their contention. If this could be rightly done suit could have been brought on the indemnity contract the moment the bond was signed by the surety company: **reductio ad absurdum**.

The contract explodes this construction absolutely by requiring the production of "vouchers or other evidence of any loss paid . . . . in adjusting such loss," as evidence of the obligation to indemnify. (Transcript, p. 17.)

Suppose the surety had settled with the school trustees at less than a hundred cents on the dollar; could it have recovered against its indemnitors a hundred cents? Certainly not. The distinction goes back of the words "sustain or incur" and rests on the nature of the contract itself, i. e. whether it is to indemnify against **loss** or merely against **liability.**

As clearly drawing the aforesaid distinction we cite to the Court the case of

Wicker v. Hoppock, 6 Wal. 94, and 22 Cyc. 79, et seq.

On page 99, Mr. Justice Swayne uses the following language:

> "In that class of cases (meaning suits on indemnity contracts) the obligee can not recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

In the case of National Bank of Newburgh v. Bigler, 83 N. Y. 62, (Court of Appeals), this language occurs:

> "Where the indemnity is against a charge for fixed legal liability, the obligee is to be saved from the thing specified, and the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform; while, on the other hand, where the covenant is for indemnity only, and against resultant damages, these must be actually suffered before an action can be maintained."

It is to be observed that in the contract now before the Court the loss of whatever kind **"resulting from any act"** etc., is the form of expression used. That is to say, the contract is one of indemnity only against resultant losses and damages, and therefore no such losses and damages can arise until they have been actually suffered by payment, and prior to such actual payment no right of action existed.

See also:

22 Cyc. 87 (5), Note 55;
Id. 90 (6), Note 67;
Id. 91, Note 68;
Id. 92, Note 70;
16 Am. & Eng. Encyc. 178 (a) and note.

The indemnity contract undertakes to protect the surety company against loss by reason of its liability to the school trustees, while the undertaking of the surety company in the bond was to protect the school trustees from loss through the failure of plaintiff in error to carry out the construction contract. It is nothing short of confusion to claim that the rights and liabilities of the parties to these two agreements are the same.

With these distinctions clearly in mind the entire fabric of the argument of the plaintiff in error falls to the ground.

Counsel argue in the fourth division of their brief that no claim could have arisen in favor of the surety under the indemnity contract without there first having been a breach of the bond, under which breach the liability of the principals immediately arose, regardless of the contract of indemnity. We respectfully submit that this argument is not sound. It is entirely possible that the surety might have valid claim against the principal under the indemnity contract, though no actual breach of the bond had ever occurred. Suppose, for instance, that the surety had sustained losses and expenses in compelling the principal to comply with the contract and prevent a breach of the bond. Such losses would undoubtedly have come within the condition of the indemnity agreement, which was to hold the surety harmless from all losses which it may sustain or incur by reason of its having executed said bond, **"resulting from any act"** of the principal. The principal might have been dilatory in his work and the surety might have been

compelled to send extra help or additional architects, or draftsmen or other assistance, in order to comply with the contract and prevent a breach of the bond. The losses and expenses thus incurred would come within the very letter of the indemnity agreement, although the result and intended effect of such things were to prevent a breach of the bond.

The case of Wood v. U. S. F. & G. Co., 143 Fed. 424, from which counsel quote in the fourth division of the brief for plaintiff in error, does not militate against our present contention. District Judge Dodge was there considering the question of preference under Section 60 of the Bankrupt Act, and his dictum that the liability of the principal to his surety was a provable claim, though not liquidated, was in reality obiter. The question before him was whether or not there was any basis for taking the security represented by the plant and its use in completing the contract for the faithful performance of which a bond was given. It is, of course, true that one can take security for a contingent liability. Such is often done, and yet such liability would not be a provable debt in bankruptcy because of the very contingencies which inhered in it. This was the exact case of Insley v. Garside, 121 Fed. 699, supra. Judge Dodge did not have under consideration that clause of the indemnity agreement now before this Court, and his decision in the Wood case is neither controlling nor persuasive in the present discussion.

The case of Smith v. Howell, 6 Ex. 739; 86 Rev. 458, and Newborn v. Macelham, 97 Ontario Appeal, 738, on their face appear to support the contention of the plaintiff in error, but we respectfully submit they are not in accord with the current of authority nor supported by the true interpretation of strict indemnity agreements. The Georgia Court of Appeals, from whose decision this writ of error was taken, declined to follow these cases.

The fact that the owners of the building proved a claim against the bankrupt throws no light on the present discussion. The liability there grew out of the bond and the breach of it. The liability here grows out of the indemnity agreement which was collateral to the bond and imposed a different obligation. It is significant, too, that the amount proven by the owners in the bankruptcy case was different from the amount recovered from the

surety in the judgment which the surety paid and for reimbursement of which payment this suit was brought.

There is a class of cases, and on these the principal relies, holding that sureties, and endorsers on commercial paper, and persons similarly situated have provable claims against their bankrupt principals even though the commercial paper may not have fallen due, and even though such sureties or endorsers have not suffered any pecuniary loss, and even though such claims are in a sense contingent. There is, however, we respectfully submit, a very clear distinction between these cases and the case at bar, and this distinction is in a measure pointed out by Remington in his work on bankruptcy, Vol. 1, Section 647, page 389. It is easily seen that these cases are widely different, in that the contract in the one case is an unconditional undertaking to pay a certain and liquidated amount, or one that may be easily made certain, while in the other case, as in the case at bar, the undertaking is to indemnify against loss as a consequence of liability previously or contemporaneously assumed.

By way of summary, the claim of the surety in this case, to be provable at all, must be provable under Section 63, a-4, as construed in the case of In re Roth & Appel, 181 Fed. 673. Said clause, under such construction, reading as follows:

> "Debts of the bankrupt may be proved and allowed against his estate which are . . . . (4) founded upon an open account or upon a contract express or implied, absolutely owing at the time of the filing of the petition."

63 (b):

> "Unliquidated claims against a bankrupt may be liquidated and thereafter proven."

We respectfully contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as

such not provable and therefore not affected by the bankrupt principal's discharge.

Respectfully submitted,

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Attorneys for Defendant in Error.

WILLIAMS *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 80. Argued January 18, 1915.—Decided February 23, 1915.

Statutes should be sensibly construed, with a view to effectuating the legislative intent.

It is the purpose of the Bankruptcy Act to convert the assets of the bankrupt into cash for distribution among creditors and then relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from obligations and responsibilities consequent upon business misfortunes.

Within the intendment of the bankruptcy law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation.

Under the provisions of the Bankrupt Act, the surety of the bankrupt either shares, or enjoys due opportunity to share, in the principal's

estate, and, therefore, the discharge of the bankrupt acquits the obligation between them incident to the relationship.

A discharge in bankruptcy acquits the express obligation of the principal to indemnify his surety against loss by reason of their joint bond conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy although the surety did not pay the consequent damage until thereafter.

11 Ga. App. 635, reversed.

THE facts, which involve the construction of the Bankruptcy Act and effect of a discharge in bankruptcy, are stated in the opinion.

Mr. J. Howell Green and *Mr. Alex. C. King* for plaintiff in error.

Mr. Alex. W. Smith, Jr., with whom *Mr. Alex. W. Smith* was on the brief, for defendant in error:

A discharge in bankruptcy shall release a bankrupt from all his provable debts, and the "provable debt" from which the bankrupt is released means an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in § 63-*a*. 1 Remington on Bankruptcy, § 628.

The question whether or not a debt is provable turns upon its status at the time of the filing of the petition. *Id.*, § 629; *Zavelo* v. *Reeves*, 227 U. S. 625.

Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Section 63-*b* adds nothing to the class of debts prescribed under 63-*a*. It merely permits the liquidation of an unliquidated claim provable under the latter provision. *Dunbar* v. *Dunbar*, 190 U. S. 340; *Coleman Co.* v. *Withoft*, 195 Fed. Rep. 250; *In re Roth & Appel*, 181 Fed. Rep. 673; *In re Adams*, 130 Fed. Rep. 381.

Contingent claims are not provable under the act of

1898. 1 Remington, § 640; *In re Roth*, 181 Fed. Rep. 673; *Coleman* v. *Withoft*, 195 Fed. Rep. 250.

Contingent is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility.

All anticipated future events, which are not certain to occur are contingent events, and may be properly denominated mere possibilities, more or less remote.

A contingent claim is one which has not accrued and which is dependent upon the happening of some future event. 2 Words & Phrases, p. 1498.

Sureties and endorsers on commercial paper and others similarly situated have a provable claim against their bankrupt principal even though at that time there has been no default on the part of the bankrupt. 1 Remington, §§ 642–645, and cases cited.

There is a very clear distinction between this class of cases and the case at bar, involving a surety for the "faithful performance" of a contract or duty by the bankrupt. 1 Remington, § 647.

Such claims are contingent: First, on a breach by bankrupt of the contract or duty.

Second, on actual pecuniary loss suffered by the surety as a consequence of said breach by the bankrupt.

The existence of either or both of said contingencies at the time of the filing of the petition in bankruptcy renders the claim of the surety non-provable, and therefore unaffected by the bankrupt's discharge. *Goding* v. *Rosenthal*, 6 A. B. R. 641 (Note); *Clemmons* v. *Brinn*, 7 A. B. R. 714; *Insley* v. *Garside*, 121 Fed. Rep. 699.

The distinction which reconciles the positions of both sides of this case and the authorities cited by them respectively, is that which exists between a contract assuming liability, and one indemnifying against loss. The terms of such contracts fix the law applicable to them respectively.

The distinction is clearly pointed out in the following cases: Contracts assuming liability: *Fenton* v. *Fidelity Co.*, 36 Oregon, 283; *Anoka Lumber Co.* v. *Fidelity Co.*, 3 Minnesota, 286; *Tucker* v. *Murphy*, 114 Georgia, 662; *Thomas* v. *Richards*, 124 Georgia, 942; *Mills* v. *Dows Adm'r*, 133 U. S. 423, 432; *Johnson* v. *Risk*, 137 U. S. 300, 308.

Contracts indemnifying against loss: *Carter* v. *Ætna Ins. Co.*, 76 Kansas, 275; *Allen* v. *Ætna Ins. Co.*, 145 Fed. Rep. 881; *Connelly* v. *Bolster*, 187 Massachusetts, 266; *Harvey* v. *Daniel*, 36 Georgia, 562; *Wicker* v. *Hoppock*, 6 Wall. 94; *Insley* v. *Garside*, 121 Fed. Rep. 699; *National Bank* v. *Bigler*, 83 N. Y. 62.

The contract recovered on in the case at bar is a contract of indemnity and falls within the latter class in all of which it is well-nigh universally held that to recover for a breach, loss or damage must be sustained by actual payment of money, or its equivalent under the law. 16 Am. & Eng. Encyc., 2d ed., 178 (a) and notes; 22 Cyc. 79–92.

Indemnity means an obligation to make good a loss; no loss, no obligation.

Mr. Justice McReynolds delivered the opinion of the court.

This cause presents the following question: Does a discharge in bankruptcy acquit an express obligation of the principal to indemnify his surety against loss by reason of their joint bond conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy when the surety paid the consequent damage thereafter?

R. P. Williams and J. B. Carr, as partners, entered into a contract with certain school trustees—April, 1900,—to construct a building in Florida, and, with defendant in error company as surety, gave a bond guaranteeing its

faithful performance. Contemporaneously with the execution of the bond and as a condition thereto, the partners made a written application to the company in which they obligated themselves "to indemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever, resulting from any act, default, or neglect of ours that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof."

November 9, 1900, the partners abandoned the contract; the trustees took possession and completed the structure April 13, 1901, and on May 14 following they made adequate demands for payment of the amount expended beyond the contract price. This being refused they brought suit and recovered a judgment against the company July 1, 1904, which it satisfied February 20, 1905, by paying $5,475.36.

Voluntary petitions were filed by partnership and members May 28, 1901, and all were immediately adjudged bankrupt. The schedules specified the building contract, its breach and the bond, and their adequacy is not now questioned. In due time the school trustees proved their claim and it was allowed. October 5, 1901, the petitioners received their discharges. No dividend was declared, all the assets being required for administration expenses.

Defendant in error brought suit in the City Court of Atlanta against the firm and its members—August, 1911,—setting up the written promise made to it when the bond was executed and asking judgment for the amount paid in satisfaction of the recovery thereon, together with attorneys' fees. The matter was submitted upon an agreed statement of facts and judgment went in favor of the company; this was affirmed by the Court of Appeals of Georgia (11 Ga. App. 635) and the cause is here upon writ of error.

The state court treated the written contract of indemnity between the bankrupts and the surety company as the expression of what would have been implied and declared (p. 644): "The bankrupts owed the surety nothing at the time the petition in bankruptcy was filed, because the surety had paid nothing for their benefit and the relation of debtor and creditor did not exist between them until after actual payment by the surety. . . . The surety had no claim against the bankrupts which it could file in its own name. . . . The liability to the surety by the bankrupts was altogether contingent and might never have arisen. Indeed, we hold that at the time the petition in bankruptcy was filed the surety had no claim or debt against the bankrupts which could have been proved in the bankrupt court under § 63 of the bankrupt act."

Counsel for the company "contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as such not provable and therefore not affected by the bankrupt principal's discharge."

If the doctrine announced by the court below and maintained here by counsel is correct, a discharge in bankruptcy may have very small value for the luckless debtor who has faithfully tried to secure his creditors against loss; and, in effect, a demand against him may be kept alive indefinitely according to the interest or caprice of his surety.

It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to

start afresh free from the obligations and responsibilities consequent upon business misfortunes. *Wetmore* v. *Markoe*, 196 U. S. 68, 77; *Zavelo* v. *Reeves*, 227 U. S. 625, 629; *Burlingham* v. *Crouse*, 228 U. S. 459, 473. And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 661, 667.

The statute (July 1, 1898, c. 541, 30 Stat. 544), as amended in 1903 (February 5, 1903, c. 487, 32 Stat. 797), provides: Section 17. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations." Section 63. "Debts of the bankrupt may be proved and allowed against his estate which are . . . (4) founded upon an open account, or upon a contract express or implied; . . . Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." Section 1. (11). "Debt shall include any debt, demand, or claim provable in bankruptcy." Section 2. Courts of bankruptcy have jurisdiction to "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." Section 57-*i*. "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." General Order

XXI.—4. "The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt." Section 16. "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation. *Dunbar* v. *Dunbar*, 190 U. S. 340, 350; *Crawford* v. *Burke*, 195 U. S. 176, 187; *Grant Shoe Co.* v. *Laird*, 212 U. S. 445, 448; *Zavelo* v. *Reeves*, 227 U. S. 625, 631. It provides complete protection and an ample remedy in behalf of the surety upon any such obligation. He may pay it off and be subrogated to the rights of the creditor; if the creditor fails to present the claim for allowance against the estate he may prove it; and in any event he has abundant power by resort to the court or otherwise to require application of its full *pro rata* part of the bankrupt's estate to the principal debt. To the extent of such distribution the obligation of the bankrupt to the surety will be satisfied. Although, unlike the act of 1867, the present one contains no express provision permitting proof of contingent claims, it does in substance afford the surety on a liability susceptible of liquidation the same relief possible under the earlier act, *i. e.* application to the principal debt of all dividends declared out of the estate (act of March 2, 1867, §§ 19, 27, c. 176, 14 Stat. 517, 525, 529). And as the surety thus either shares or enjoys an opportunity to share in the principal's estate, we think the discharge of the latter

acquits the obligation between them incident to the relationship. *Mace* v. *Wells*, 7 How. 272, 276; *Fairbanks* v. *Lambert*, 137 Massachusetts, 373, 374; *Hayer* v. *Comstock*, 115 Iowa, 187, 191; *Post, Admr.*, v. *Losey*, 111 Indiana, 74, 80; *Smith* v. *Wheeler*, 55 App. Div. (N. Y.) 170, 171.

It would be contrary to the basal spirit of the Bankrupt Law to permit a surety, by simply postponing compliance with his own promise in respect of a liability until after bankruptcy, to preserve a right of recovery over against his principal notwithstanding the discharge would have extinguished this if the surety had promptly performed as he agreed. Such an interpretation would effectually defeat a fundamental purpose of the enactment.

The written indemnity agreement embodied in the bankrupt's application to the surety company for execution of the bond, so far as its terms are important here, but expressed what otherwise would have been implied from the relationship assumed by the parties. At the time of the bankruptcy the obligation under this agreement was ancillary to a liability arising out of a contract estimation of which was easy of establishment by proof. There was no uncertainty which could prevent the surety from obtaining all benefits to which it was justly entitled from the bankrupt estate.

Upon the facts presented we are of opinion that the discharge pleaded by the plaintiff in error constituted a good defense and the court below erred in holding otherwise. The judgment is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.